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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 426

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

CLARENCE E. HOOD, JR., FRANK F. MIZE, BASCOM C. BEASLEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

FILED NOVEMBER 13, 1951

PROBABLE JURISDICTION NOTED DECEMBER 3, 1951

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1-6 In the United States District Court for the Southern District of Mississippi.

Sec. 371, Title 18, U.S.C., and Sec. 215, Title 18, U.S.C.

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE E. HOOD, JR., FRANK F. MIZE, BASCOM C. BEASLEY, CURTIS ROGERS, FORREST B. JACKSON, MRS. C. V. MURPHY, CLAUDE V. MURPHY, DEWEY MCLEOD, HENRY DEBROW, MARGARET LAVERNE YELVERTON, JAMES H. WILKINSON, AND ROY F. BRASHIER, DEFENDANTS

INDICTMENT—Filed July 19th, 1951

The Grand Jury Charges:

That beginning on or about July 1, 1949, at Jackson, in the Southern District of Mississippi, and continuing thereafter to and including the date of the return and filing of this indictment

CLARENCE E. HOOD, JR.,
FRANK F. MIZE,
BASCOM C. BEASLEY,
CURTIS ROGERS,
FORREST B. JACKSON,
MRS. C. V. MURPHY,
CLAUDE V. MURPHY,
DEWEY MCLEOD,
HENRY DEBROW,
7 MARGARET LAVERNE YELVERTON,
JAMES H. WILKINSON, and
ROY F. BRASHIER,

hereinafter called the defendants, did unlawfully, wilfully and knowingly conspire, combine, confederate, and agree together and with each other, and with some one or more of the following persons: L. W. Rowzee, Earl (Cy) Ball, Arthurine B. Campbell, Douglas Smith, James L. Reeves and Homer Leggett, herein named as co-conspirators, but not indicted, and with divers other persons, to commit certain offenses against the United States, to wit, to violate Section 215, Title 18, United States Code, that is to say:

CLARENCE E. HOOD, JR.,
FRANK F. MIZE,
BASCOM C. BEASLEY,
CURTIS ROGERS,
FORREST B. JACKSON,
MRS. C. V. MURPHY,

CLAUDE V. MURPHY,
DEWEY McLEOD,
HENRY DEBROW,
MARGARET LAVERNE YELVERTON,
JAMES H. WILKINSON, and
ROY F. BRASHIER,

the said defendants, at the place and throughout the time aforesaid, unlawfully, wilfully and knowingly conspired, combined, confederated and agreed that they and each of them would solicit and receive from numerous persons, and cause to be solicited and
8 received from said persons, various sums of money as political contributions to the Mississippi Democratic Committee, and for the personal emolument of the defendants, in consideration of the promise of recommendations, and the promise of support and use of influence on the part of said defendants and the Mississippi Democratic Committee in obtaining for said persons certain appointive offices and places under the government of the United States, to wit: the offices and places of postmaster, rural mail carrier, including transfers to and from said offices and places, and offices and places with and under the Office of Price Stabilization such as Chairman and supervisors of County Ration Boards, all of said offices and places being located, and to be located, in various cities and towns throughout the State of Mississippi; the names of some of said persons, together with the amounts solicited and contributed, and the appointments sought and promised being as follows:

Name	Solicited	Contributed	Appointment
Aubrey W. Stephens	$1,000.00	$1,000.00	Rural carrier at Bovina, Mississippi
Lawrence B. Williams	1,000.00	1,000.00	Rural carrier at Little Rock, Miss.
J. D. Box	500.00	500.00	Rural carrier at Booneville, Miss.
[Fol. 9]			
Roy W. Haines	1,000.00	1,000.00	Rural carrier at Lucedale, Miss.
Oscar L. Watts	1,000.00	1,000.00	Rural carrier at Crystal Springs, Miss.
Grover C. Smith	1,000.00	500.00	Rural Carrier at Sontag, Mississippi
Robert E. Whiteside	500.00	500.00	Rural carrier at Mooreville, Miss.
Charles H. Alford	500.00	500.00	Rural carrier at Philadelphia, Miss.
George B. Kerr	750.00	750.00	Rural carrier at McCook, Miss.
Elmer M. Palmer	600.00	600.00	Acting Postmaster at Cumberland, Miss.
Archie R. Watson	2,000.00	380.00	Rural carrier at Stewart, Mississippi
Eulan G. Moorehead	1,000.00	1,000.00	Rural carrier at Winborn, Miss.

Name	Solicited	Contributed	Appointment
James E. Meadows, Jr.,	750.00	750.00	Rural carrier at Mendenhall, Miss.
Sidney Rivers Ayres	1,000.00	1,000.00	Rural carrier at Winborn, Miss.
W. Denny Russ	400.00	400.00	OPS, Pearl River County, Mississippi
Edgar Earl Sims	300.00	300.00	OPS, Marion County, Mississippi

and others, which by reason of their great number are not listed herein, and

It was further a part of said conspiracy that the defendants, in soliciting and receiving contributions from said persons in the manner and under the circumstances aforesaid, would make and cause to be made additional representations, promises and pretenses to said persons, to the effect that the said contributions would be used by the Mississippi Democratic Committee in furtherance of and in rebuilding the Democratic Party throughout the State of Mississippi; and

It was further a part of said conspiracy that the defendants would, in soliciting and receiving contributions from persons who were applicants for said offices and places, make the additional representations and pretenses that the Mississippi Democratic Committee was in need of funds to meet office expenses; would require of said persons that certain large contributions be made in cash, and would refuse to give receipts therefor; and would use the name and office of the Mississippi Democratic Committee as a means, method and instrument by and through which to obtain large sums in contributions for their own use and benefit.

It was further a part of said conspiracy that the said defendants would fail to maintain books and records reflecting the amount of contributions and money received and disbursed by the Mississippi Democratic Committee, and the names of and amounts contributed by those who were applicants for appointment to the offices and places aforesaid; and

It was further a part of said conspiracy that the defendants would fail to report or disclose to the Mississippi Democratic Committee the amount of money received from the persons solicited as aforesaid and the true purposes for which such money was being used.

It was further a part of said conspiracy that the defendants would recommend, and cause to be recommended for appointment to the said offices and places, numerous persons without regard to their grade or standing on the Civil Service Eligible List, and would make, promise, and cause such recommendations for appointments to be made solely on the basis of whether said persons contributed or promised to contribute various amounts of money to the Mississippi Democratic Committee.

And in furtherance of said conspiracy and to effect the objects

and purposes thereof, the defendants did commit, among others; the following overt acts:

12 1. On or about February 27, 1951, the defendant CURTIS ROGERS, at Raleigh, Mississippi, drew and cashed a check in the sum of $6,000.00 on the account of the Mississippi Democratic Committee in the Bank of Raleigh, Raleigh, Mississippi.

2. During the month of February, 1951, the exact date being to the Grand Jury unknown, the defendant, CURTIS ROGERS, at Jackson, Mississippi, advanced to the defendant ROY F. BRASHIER, from the funds of the Mississippi Democratic Committee, sums of money totalling approximately $2,000.00.

3. During the month of January, 1950, the exact date being to the Grand Jury unknown, the defendant CURTIS ROGERS, at Sylvarena, Mississippi, conferred with the defendant DEWEY MCLEOD, and with James E. Harvey concerning a rural mail carrier job.

4. On or about November 8, 1950, at Jackson, Mississippi, the defendant CURTIS ROGERS received from J. D. Box a contribution in the sum of $500.00.

5. During the month of February, 1950, the exact date being to the Grand Jury unknown, the defendant CURTIS ROGERS, at Sylvarena, Mississippi, conferred with Lawrence B. Williams con-

13 cerning a rural mail carrier job and concerning a contribution in the sum of $1,000.00.

6. During the month of December, 1950, the exact date being to the Grand Jury unknown, in the Century Building, at Jackson, Mississippi, the defendant MARGARET LAVERNE YELVERTON received from Thomas W. Keene the sum of $200.00 in cash.

7. During the latter part of December, 1949, the exact date being to the Grand Jury unknown, the defendant DEWEY MCLEOD, at Mount Olive, Mississippi, received from James W. Walker, the sum of $1,000.00 in cash.

8. During the latter part of December, 1949, the exact date being to the Grand Jury unknown, the defendant DEWEY MCLEOD, at Jackson, Mississippi, conferred with Asa L. Walker and James W. Walker concerning a rural mail carrier job and concerning a contribution in the sum of $1,000.00.

9. During the month of August, 1949, the exact date being to the Grand Jury unknown, the defendant DEWEY MCLEOD, at Mount Olive, Mississippi, conferred with C. Grady Prine concerning a rural mail carrier job.

10. On or about November 1, 1950, the defendant CURTIS ROGERS, at Sylvarena, Mississippi, received from Roy W. Haines

14 the sum of $1,000.00 in cash.

11. On or about April 3, 1950, the defendant FORREST B. JACKSON, in the Century Building, at Jackson, Mississippi, received the sum of $1,000.00 in cash from Eulan G. Moorehead.

12. On or about April 10, 1950, the defendant FORREST B. JACKSON, in the Century Building, at Jackson, Mississippi, conferred with Robert Henry Horne about a rural mail carrier job.

13. On or about April 13, 1950, the defendant FORREST B. JACKSON, in the Century Building, at Jackson, Mississippi, received the sum of $1500.00 in cash from Robert Henry Horne.

14. During the month of October, 1950, the exact date being to the Grand Jury unknown, the defendant FORREST B. JACKSON, in the Century Building, at Jackson, Mississippi, conferred with Ray W. Haines concerning a rural mail carrier job.

15. On or about April 26, 1950, the defendant CURTIS ROGERS, at Jackson, Mississippi, conferred with Aubrey W. Stephens concerning a rural mail carrier job and concerning a contribution in the sum of $1,000.00.

16. During the month of June, 1950, the exact date being to the Grand Jury unknown, the defendant BASCOM C. BEASLEY, in the Century Building, in Jackson, Mississippi, received from Charles H. Alford the sum of $500.00 in cash.

17. On or about April 28, 1950, the defendant BASCOM C. BEASLEY, at the offices of the Mississippi Democratic Committee, at Jackson, Mississippi, conferred with Robert E. Whiteside.

18. On or about July 5, 1950, the defendant BASCOM C. BEASLEY, at the offices of the Mississippi Democratic Committee, at Jackson, Mississippi, conferred with Grover C. Smith.

19. During the month of July, 1949, the exact date being to the Grand Jury unknown, the defendant BASCOM C. BEASLEY, at the offices of the Mississippi Democratic Committee, in Jackson, Mississippi, conferred with Sidney D. Parker concerning a rural carrier job.

20. On or about July 29, 1950, the defendant FRANK F. MIZE, at Jackson, Mississippi, addressed a letter to Acey Carraway of the National Democratic Executive Committee, Washington, D. C.

21. On or about February 5, 1951, at the offices of the Mississippi Democratic Committee, at Jackson, Mississippi, the defendants FRANK F. MIZE, CURTIS ROGERS, and JAMES H. WILKINSON conferred with B. Pat Green and J. W. Maxey.

22. During the month of March, 1950, the exact date being to the Grand Jury unknown, the defendants CLARENCE E. HOOD, JR., FRANK F. MIZE, and CURTIS ROGERS, at the Century Building, in Jackson, Mississippi, conferred with Carl Frank Ferrell.

23. On or about March 25, 1950, the defendant HENRY DEBROW, at Jackson, Mississippi, accompanied Sidney Rivers Ayres from the Walthall Hotel to a place across the street from the Century Building.

24. On or about March 27, 1950, the defendant HENRY DEBROW,

at Jackson, Mississippi, received $1000.00 cash from Sidney Rivers Ayres.

25. On or about March 27, 1950, at Jackson, Mississippi, the defendant BASCOM C. BEASLEY at the offices of the Mississippi Democratic Committee, handed to Sidney Rivers Ayres a copy of a letter dated March 27, 1950, addressed to Hon. B. C. Burke, Deputy Postmaster General, Post Office Department, Washington,
17 D. C.

26. On or about October 6, 1950, at Jackson, Mississippi, the defendant CLARENCE E. HOOD, JR., wrote a letter dated October 6, 1950, addressed to Hon. Joseph H. Lawler, Assistant Postmaster General, Washington, D. C., concerning the appointment of Joseph T. Ruble to the position of Acting Postmaster at West Point, Mississippi.

27. On or about November 20, 1950, at Winona, Mississippi, the defendant Mrs. C. V. MURPHY conferred with George B. Kerr concerning a rural mail carrier job.

28. On or about November 22, 1950, at Winona, Mississippi, the defendant Mrs. C. V. MURPHY cashed a check signed by George B. Kerr in the sum of $500.00.

29. On or about January 26, 1951, at Winona, Mississippi, the defendant Mrs. C. V. MURPHY cashed a check signed by George B. Kerr in the sum of $250.00.

30. On or about January 25, 1951, at Winona, Mississippi, the defendant Mrs. C. V. MURPHY wrote a letter to Mrs. Mary E. Dodd, Swan Lake, Mississippi.

31. During the month of November, 1950, the exact date being to the Grand Jury unknown, the defendants CLAUDE V. MURPHY and Mrs. C. V. MURPHY, at Cumberland, Mississippi, con-
18 ferred with Elmer M. Palmer concerning a postmaster's job and concerning a contribution of $600.00.

32. During the month of October, 1950, the exact date being to the Grand Jury unknown, the defendants CLAUDE V. MURPHY and Mrs. C. V. MURPHY, at Winona, Mississippi, conferred with Henry P. Bingham concerning a rural mail carrier job and concerning a contribution of $300.00.

33. On or about November 7, 1950, at Winona, Mississippi, the defendant Mrs. C. V. MURPHY cashed a check in the sum of $350.00 signed by L. F. Green.

34. On or about February 13, 1951, the defendant ROY F. BRASHIER, at Picayune, Mississippi, solicited W. Denny Russ to become Supervisor of the County Ration Board to be set up in Pearl River County, Mississippi.

35. On or about February 9, 1951, at Columbia, Mississippi, the defendant ROY F. BRASHIER solicited Edgar Earl Sims to become Chairman of the County Ration Board to be set up in Marion County, Mississippi.

36. On or about February 10, 1951, the defendants ROY F. BRASHIER, JAMES H. WILKINSON and MARGARET LAVERNE YELVERTON, at the offices of the Mississippi Democratic Committee, Jackson, Mississippi, conferred with Early Gray Harvey.

37. On or about February 19, 1951, at Jackson, Mississippi, the defendant MARGARET LAVERNE YELVERTON typed a letter dated February 19, 1951, addressed to Mr. H. L. Phares, Phares Motor Company, Woodville, Mississippi.

38. On or about February 5, 1951, the defendant MARGARET LAVERNE YELVERTON, at Jackson, Mississippi, delivered to Mr. J. W. Maxey a letter of the same date, addressed to him at Box 1295, Hattiesburg, Mississippi.

39. On or about December 7, 1950, at Jackson, Mississippi, the defendant CLARENCE E. HOOD, JR., caused a letter dated December 7, 1950, to be addressed and mailed to Hon. Joseph H. Lawler, Assistant Postmaster General, Washington, D. C.

40. On or about December 7, 1950, at Jackson, Mississippi, the defendant MARGARET LAVERNE YELVERTON wrote a letter for the Mississippi Democratic Committee, dated December 7, 1950, and addressed to Mr. John Charles Monroe, Mississippi City,
20 Mississippi.

41. On or about October 9, 1949, at Jackson, Mississippi, the defendants FORREST B. JACKSON, CLARENCE E. HOOD, JR., CURTIS ROGERS, BASCOM C. BEASLEY and FRANK F. MIZE, met and conferred with Milton H. Loflin concerning a rural carrier job.

42. During the latter part of March, 1950, the exact date being to the Grand Jury unknown, the defendant CLARENCE E. HOOD, JR., at Meridian, Mississippi, conferred with Roy W. Hall and Eulan G. Moorehead concerning a rural carrier job.

43. During the latter part of March, 1950, at Meridian, Mississippi, the defendant CLARENCE E. HOOD, JR., placed a long distance call to Jackson, Mississippi, and talked to the defendant BASCOM C. BEASLEY concerning the appointment of Eulan G. Moorehead to the office of rural carrier.

44. On or about October 5, 1950, the defendant MARGARET LAVERNE YELVERTON, in the Century Building, at Jackson, Mississippi, received from Joseph T. Ruble the sum of $500.00 in cash.

21-40 45. During either September, 1949, or October, 1949, the exact date being to the Grand Jury unknown, the defendant CLARENCE E. HOOD, JR., at Meridian, Mississippi, conferred with Alvin L. Sivley, Jr.

46. During the month of March, 1950, the exact date being to the Grand Jury unknown, at Forest, Mississippi, the defendant FRANK F. MIZE conferred with Ralph J. Perkins concerning a rural carrier job.

47. On or about September 26, 1950, the defendant FRANK F.

MIZE, at Forest, Mississippi, conferred with Joseph T. Ruble concerning Ruble's appointment to the job of postmaster.

48. During the month of December, 1949, the exact date being to the Grand Jury unknown, at Forest, Mississippi, the defendant FRANK F. MIZE received from Earl Embrey a cashier's check, payable to FRANK MIZE, in the sum of $250.00.

49. On or about February 5, 1951, at Jackson, Mississippi, the defendant JAMES H. WILKINSON solicited one P. K. McLain to become Chairman of the Office of Price Stabilization County Ration Board to be set up in Lawrence County, Mississippi.

(Section 371, Title 18, United States Code)

41 COUNT THIRTY-ONE

The Grand Jury Further Charges:

That on or about February 8, 1951, at Liberty, and within the Southern District of Mississippi, the defendant,

ROY F. BRASHIER,

did knowingly, wilfully and unlawfully solicit from Early Gray Harvey, as a political contribution, the sum of $300.00 in consideration of the defendant's promise of support and use of influence in obtaining for said Early Gray Harvey an appointive office and place under the United States, namely, an appointment as
42 Chairman of the County Ration Board to be set up and created under the Office of Price Stabilization in Amite County, Mississippi. (Sec. 215, Title 18, United States Code.)

COUNT THIRTY-TWO

The Grand Jury Further Charges:

That on or about February 8, 1951, at McComb, and within the Southern District of Mississippi, the defendant,

ROY F. BRASHIER,

did knowingly, wilfully and unlawfully solicit from Thomas B. Wilkins, as a political contribution, the sum of $300.00 in consideration of the defendant's promise of support and use of influence in obtaining for the said Thomas B. Wilkins an appointment as Chairman of the County Ration Board to be set up and created under the Office of Price Stabilization in Pike County, Mississippi. (Sec. 215, Title 18, United States Code.)

COUNT THIRTY-THREE

The Grand Jury Further Charges:

That on or about February 5, 1951, at Jackson, and
43-172 within the Southern District of Mississippi, the defendant,

JAMES H. WILKINSON,

did knowingly, wilfully and unlawfully solicit from one P. K. McLain, as a political contribution, the sum of $100.00 in consideration of the defendant's promise of support and use of influence in obtaining for the said P. K. McLain an appointive office and place under the United States, namely, an appointment as Chairman of the County Ration Board to be set up and created under the office of Price Stabilization in Lawrence County, Mississippi. (Sec. 215, Title 18, United States Code.)

173 In United States District Court

[Title omitted]

MOTION TO DISMISS COUNT—Filed September 5, 1951

The defendant moves that count 33 and specified overt act 49 of count 1 of the indictment be dismissed on the following grounds:

Count 33 does not state facts sufficient to constitute an offense against the United States for the reason that there is and was no office or place under the United States such as Chairman of a County Ration Board as alleged in said count.

Specified overt act 49 of count 1 charges the solicitation of one to take a position that has never existed under the United States, to-wit: Chairman of the Office of Price Stabilization, County Ration Board. It can, therefore, have no application to the charge of conspiracy under Section 371, Title 18, United States Code to violate Section 215 thereof.

(S.) JAMES H. WILKINSON,
(S.) ALLAN T. EDWARDS,
Atty.

174 Certificate of service (omitted in printing.)

175 In United States District Court

[Title omitted]

MOTION TO DISMISS—Filed September 5, 1951

The defendant moves that the indictment and each Count be dismissed on the following grounds:

I

The indictment and each Count does not state facts sufficient to constitute an offense against the United States.

II

An Investigating Committee of the United States Senate held Hearings on the charges made against the defendant and for the express purpose of securing prosecution against the defendant, and which was used as a basis for presenting said case to the
176 grand jury—using the same evidence and witnesses before the grand jury as was taken and used before the Investigating Committee. In the Hearing before the Committee, the defendant was forced under subpoena, and under threat of prosecution for contempt on refusal to answer, to give evidence before the Committee. And the defendant is now being put to trial on charges as developed before the Committee when he was so compelled to testify. The defendant is entitled to immunity under the Constitution of the United States, Fifth Amendment, and under the laws of the United States against further prosecution on said charges.

The testimony of defendant before the said Senate Committee is not available to him, but is a public record of the United States and is referred to and made exhibit hereto as fully as if set out herein. A copy of such testimony will be furnished if denied or desired.

III

Section 215 of Title 18, United States Code entitled Acceptance or Solicitation to Obtain Appointive Public Office, to violate the terms of which it is alleged in said indictment the defendants conspired to accomplish, is unconstitutional in that it impairs the right of
177 any citizen of the United States to make a contract and deprives persons of their rights guaranteed to them under the laws and Constitution of the United States. Such powers not being delegated to the Congress but expressly reserved to the people or the state under the Ninth and Tenth Amendments to the Constitution of the United States; and is in violation of the Fifth Amendment to the Constitution.

IV

Said Section 215, Title 18 of the United States Code is void for uncertainty as to acts made an offense and ambiguous as to limits with no distinction between proper and improper, or legal and illegal influence, and of persons included or subject thereto.

V

Count I of said indictment attempts to charge the defendants as having conspired to violate Section 215, Title 18, United States Code and in the same Count alleges a violation of said Section, and is therefore void as being duplicitas.

VI

178 The indictment contains immaterial, irrelevant and prejudicial matters, and alleges, in such a way and manner as to be highly prejudicial to the defendants and which cannot be reached by motion to strike, in this:

(a) Six persons are named as co-conspirators, but not indicted, without revealing their connection with the alleged conspiracy, or without setting forth any overt act by them, thus making it appear that these persons are connected in a wide conspiracy with the defendants, and thus by allegation only cast a doubt and suspicion on their testimony as witnesses should any of them be called as witnesses to testify by any of the defendants.

(b) On page three of the indictment, beginning with the name of Aubrey W. Stevens and ending with the name Edgar Earl Sims, sixteen persons are alleged to have, upon solicitation by the defendants, contributed the sum of $13,850.00, for various alleged appointments, and the same is alleged as evidence of the actual violation of Section 215, Title 18 of the United States Code, some of which offices or places under the United States did not exist and
179 have not been brought into existence since, yet the same is made evidence by allegation to be carried by the trial jury, resulting in improper evidence before the jury in the jury room.

(c) In the second paragraph, page three, the indictment alleges that the defendants represented that funds solicited would be used for the re-building of the Democratic Party in Mississippi. It is not alleged that this was an illegal or improper use of such funds. The said allegation is no part of the offense charged, but as a part of the indictment will be carried into the jury room and calculated to unduly influence and prejudice the minds of the jurors who may belong to the so-called State Rights, and to unduly influence those jurors who may be prejudiced against the National Democratic Party and the National Administration.

VII

Paragraph three, beginning page three, and Paragraphs two, three and four, page four of the indictment, contains no allegation of violation of any law of the United States and no allegation of conspiracy to violate any law of the United States, but con-
180 tains statements, as statements of fact calculated to influence and prejudice the minds of the jury in the trial of said case, particularly in the jury room.

VIII

The allegations of overt acts from 1 to 49, both inclusive, beginning on page four of the indictment and running to Count II, page ten, are not allegations of overt acts towards the conspiracy or indicating conspiracy. The said acts are not within themselves illegal and there is no allegation of the way or manner in which they effect the conspiracy. The alleged overt acts are abstract statements of fact stated as evidence in the indictment to be carried into the jury room by the trial jury.

IX

It was necessary to allege and prove the overt acts committed by the defendant in furtherance of the alleged illegal conspiracy. It is alleged in overt act 34, page eight, that the defendant, Roy F. Brashier, at Picayune, Mississippi solicited W. Denny Russ to become Supervisor of the County Ration Board for Pearl
181 River County, when as a matter of fact no such office or place under the United States under the Office of Price Stabilization or otherwise had been established, set up, designated or promulgated at the time, nor had any other such office or place on a county level been established, set up, designated or promulgated in February, 1951 or since.

X

The defendant, Roy F. Brashier, is alleged to have conspired with the other defendants to sell offices and places with and under the Office of Price Stabilization such as Chairman and Supervisor of County Ration Boards, and in overt act 35, page eight of the indictment it is alleged that the said defendant on February 9, 1951 solicited Edgar Ernest Sims to become Chairman of County Ration Board in Marion County, Mississippi when no such office or place under the United States under Office Price Stabilization had been established, set up, designated or promulgated, nor had any other such office or place on a county level been established, set up, designated or promulgated in February, 1951 or since.
182 And the defendant could not conspire to do the impossible.

XI

Count Thirty-one, page 21 of the indictment, charges the defendant as having on February 8, 1951 at Liberty, Mississippi solicited from Early Gray Harvey, as a political contribution, the sum of $300.00 in consideration of his promise of support and use of influence in obtaining for said Harvey, an appointive office and place under the United States, namely, an appointment as Chairman of the County Ration Board to be created under Office of Price Stabilization in Amite County, as being violation of Section 215, Title 18, United States Code, when no such office or place under the United States under Office Price Stabilization or otherwise on said date or since had been established, set up, designated or promulgated nor had any such office or place been created upon a county level.

The defendant therefore could not conspire to sell or use his influence in acquiring an office or place not in existence nor was promulgated.

183

XII

Count Thirty-Two, page 21 of the indictment, alleges that the defendant on February 8, 1951 at McComb solicited from Thomas B. Wilkins as a political contribution $300.00 in consideration of a promise of support and use of influence to obtain for said Wilkins an appointment as Chairman of the County Ration Board to be set up and created under Office of Price Stabilization for Pike County and does not allege with whom he was to use his influence and whether or not such party themselves passed any influence or power, when in fact no such an office or place under the United States or under Office of Price Stabilization had been established, set up, designated or promulgated at that time or since. The defendant therefore could not conspire to sell an office or position not in existence nor never having been promulgated.

XIII

Because it is shown by reasonable inference and interpretation that this defendant was connected with the Democratic Committee for the period of time of only six days in that the overt acts 184-191 and Counts alleged against him in the indictment covers the period of time from February 8, 1951 to and through February 13, 1951, and the acts and charges alleged against him were to use his influence to have the named parties appointed to the office or place of County Chairman for their respective counties for the Ration Board Office Price Stabilization when in fact

no such office and place existed or had been contemplated then or since.

(S.) J. ED FRANKLIN,
Attorney for Defendant, Roy F. Brashier,
1411-12 Deposit Gy. Bk. Bldg.,
Jackson, Mississippi.

192 In United States District Court

[Title omitted]

STIPULATION—Filed September 5, 1951.

It is stipulated and agreed by and between the attorneys representing the Government and attorneys representing the defendant in the above styled and numbered case that no office or place under the United States known as Supervisor or Chairman of a County Rationing Board under Office Price Stabilization for the District of Mississippi either in February 1951 and up to and including the date of the return of the indictment herein has been established, set up, or designated in the State of Mississippi, nor has any such office, place or position on a county level been established, set up or designated in the State of Mississippi during either the month of February, 1951 and up to and including the date of the
193 return of the indictment herein.

Witness our signatures this 5th day of September, 1951.

(S.) BEN BROOKS,
(S.) JOSEPH E. BROWN,
(S.) ROBERT E. HAUBERG,
Attorneys for the United States Government.
(S.) J. ED. FRANKLIN,

Attorneys for Defendant.

194 In United States District Court

No. 2164

UNITED STATES OF AMERICA, PLAINTIFF

VS.

CLARENCE E. HOOD, JR., ET AL., DEFENDANTS

ORDER—Filed September 6, 1951

Coming on to be heard a motion to dismiss of the defendant, Roy F. Brashier, and motion to dismiss of the defendant, James H. Wilkinson, and that portion of the motions of the several defend-

ants dealing with the question of the Office of Price Stabilization in Mississippi, the same being consolidated by the Court for the purpose of hearing, and the Court taking judicial notice that no office or place of Chairman of the County Ration Board under the Office of Price Stabilization for the District of Mississippi had been created or was in existence during the period of time covered by the indictment in this cause, and the Court having heard and considered the argument of counsel on both sides, it is considered and so ordered that said motions be and the same are hereby sustained and the indictment dismissed as to the defendant Roy F.
195-200 Brashier on Counts 31 and 32, and said indictment is dismissed as to defendant James H. Wilkinson on Count 33 of said indictment, and that all portions of Count 1 of the indictment dealing with offices or places as Chairman or Supervisor of County Ration Boards under the Office of Price Stabilization and the overt acts thereunder dealing with such offices or places are hereby stricken as surplusage.

The plaintiff in open Court excepting to the action of the Court, the exception is hereby allowed.

Ordered this 6th day of September, A. D. 1951.

(S.) ALLEN COX,
United States District Judge.

201 In United States District Court

[Title omitted]

NOTICE OF APPEAL—Filed October 4, 1951

The United States hereby appeals to the Supreme Court of the United States from the order of the United States District Court for the Southern District of Mississippi, entered September 5, 1951, dismissing the indictment charging the defendants with violations of 18 U.S.C. 215 and conspiracy to violate 18 U.S.C. 215.

Dated October 4, 1951.

(S.) PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington, D. C.

202-213 (S.) JOSEPH E. BROWN,
United States Attorney,
Southern District of Mississippi.

214 In United States District Court

[Title omitted]

NOTICE PURSUANT TO RULE 12, PARAGRAPH 2 OF THE RULES OF THE SUPREME COURT—Filed October 4, 1951

To Clarence E. Hood, Jr., et al.:

Pursuant to Rule 12, Paragraph 2, of the Rules of the Supreme Court of the United States, you are hereby notified that the United States, on October 4, 1951, filed a notice of appeal to the Supreme Court of the United States from the order of the District Court dismissing the indictment, and you are hereby served with a copy of a statement as to the jurisdiction of the Supreme Court in the above-entitled cause.

Your attention is directed to the provisions of Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, copied in the margin.

(S.) JOSEPH E. BROWN
United States Attorney
Southern District of Mississippi

215 Service is acknowledged this 4th day of October, 1951.
(S.) J. ED FRANKLIN
Counsel for Appellee, Atty. for Defendant Roy F. Brashier

Service is acknowledged this 5th day of October, 1951.
(S.) WILL S. WELLS
Counsel for Appellee, Forrest B. Jackson

Service is acknowledged this 4th day of October, 1951.
(S.) ALLAN T. EDWARDS
Counsel for Appellee, J. H. Wilkinson

Service is acknowledged this 8th day of October, 1951.
(S.) BIDWELL ADAM
Counsel for Appellee, Curtis Rogers

Service is acknowledged this 10th day of October, 1951.
(S.) W. W. DENT
Counsel for Appellee, Dewey McLeod

216-221 Service is acknowledged this the 8th day of October, 1951.
(S.) R. W. THOMPSON, JR.,
Counsel for Appellee, Frank F. Mize

Service is acknowledged this the 19th day of October, 1951.
(S.) W. S. HENLEY,
Counsel for Appellee, Clarence E. Hood, Jr.

Service is acknowledged this the 8th day of October, 1951.

(S.) A. F. SUMMER,
Counsel for Appellee, Bascom C. Beasley.

222 In United States District Court

[Title omitted]

STATEMENT OF PROCEEDINGS IN THE DISTRICT COURT—Filed October 18, 1951

Come the Appellees (Defendants), upon being advised that the stenographer appearing in court at the hearing on September 5, 1951, did not take stenographic notes of the proceedings at said hearing or report the same, and serves on the United States the following statement of the proceedings for use instead of a stenographic transcript, and in order that the record may truly disclose what occurred in the District Court, to-wit:

1. This case was, by the court, set for call and the bonds were made returnable before the court at Jackson, Mississippi at 9:00 o'clock A. M., on September 5, 1951.

2. The Defendants filed, on said date or on a subsequent date by leave of the court then obtained, their motions to dismiss and other pleadings, setting up their contentions that the statute
223 on which the indictments were based, to-wit 18 U.S.C.A. 215, was unconstitutional and the other points and contentions as set forth in said several pleadings, for whose terms reference is here made.

3. The defendants announced that they were ready to take up their said several motions and requested that the court proceed to hearing on them.

4. The United States announced that it was not prepared to proceed to hearing on said motions except that it was prepared to present the pending pleadings insofar as they dealt with the question of the Office of Price Stabilization in Mississippi and of the Chairman of the County Ration Board under said office, and requested that the court consider Defendants' pleadings only insofar as they related to said question.

5. Thereupon all parties argued and presented said question of whether the indictment and the counts thereof resting on charges relating to the Chairman of the County Ration Board under the office of Price Stabilization for the District of Mississippi, was sufficient in law under said statutes; and the decision of the
224 United States District Court was based solely on said argument and presentation; and the question of the constitutionality of said statutes and the other questions raised by Defend-

ants' pleadings were not presented to, or considered or passed on by said Court.

Defendants request that the United States stipulate that the foregoing shall be considered the correct record of proceedings in the District Court and if the United States will not so stipulate, they request that the United States proceed to serve its objections thereto for presentation to the Court in due course, all as provided by law and the Rules of the Courts.

(S.) W. S. HENLEY,
(S.) WILL S. WELLS,
(S.) R. W. THOMPSON, JR.,
(S.) E. B. TODD,
(S.) J. ED. FRANKLIN,
(S.) ALLAN T. EDWARDS,
(S.) JEFF WILLS,
For the Defendants.

ALBERT SIDNEY JOHNSTON, JR.
BIDWELL ADAM,
A. F. SUMMER,
CLARENCE R. SCALES.

Service of the foregoing Statement of Proceedings in The 225-231 District Court acknowledged this Oct. 18th, 1951, but no stipulation is made as to the statement.

(S.) JOSEPH E. BROWN,
United States Attorney.

232 In United States District Court

[Title Omitted]

ORDER SETTLING PORTION OF RECORD ON APPEAL—Filed November 5, 1951

Upon considering the statement of Proceedings at the hearing prepared and filed and served by Appellees on Appellant on October 18, 1951; and Appellant having filed of served no objections or proposed amendments thereto within ten days after October 18, 1951; and the Court having examined said statement and found that it correctly sets forth the proceedings at the hearing in which the Order was entered from which the appeal is prosecuted; it is ordered and decreed that the Statement of Proceedings in the District Court filed on October 18, 1951, be, and it is, settled, and approved and that said statement be included by the Clerk of the Court in the record on appeal.

Ordered, adjudged and decreed at Oxford, Mississippi, this 3rd day of November, 1951.

(S.) Allen Cox
U. S. District Judge

233 Clerk's Certificate to foregoing transcript omitted in printing.

234 In the Supreme Court of the United States

October Term, 1951

No. 426

[Title Omitted]

Statement of Points to Be Relied Upon and Designation of Record—Filed November 19, 1951

Pursuant to Rule 13, paragraph 9, of this Court, appellant states that it intends to rely upon the following points:

1. The District Court erred in holding that 18 U.S.C. 215 applies only to presently existing appointive offices and not to the sale of potential federal offices authorized by law but not yet actually created, such as the office of Chairman of the County Ration Board under the Office of Price Stabilization for the District of Mississippi, involved in this case.

2. The District Court erred in granting the motions to dismiss the indictments as to counts 31, 32 and 33.

Appellant deems the following parts of the record, as filed in the above-entitled case, necessary for the consideration of the points to be relied upon:

1. Counts 31, 32, and 33 of the indictment (page 41, line 10 to page 43, line 12).

2. Motion of appellee Wilkinson to dismiss Count 33 of the indictment (pages 173 to 174).

3. So much of the motion of appellee Brashier to dismiss the indictment as relates to counts 31 and 32 (page 175, lines 1-9 ending with "following grounds"; page 182, line 3, beginning with XI to end of page 184).

235-236 4. Stipulation (pages 192 to 193).

5. Order (pages 194 to 195).

6. Notice of Appeal (pages 201 to 202).

7. Statement of Proceedings (pages 222 to 225).

8. Order settling Portions of Record on Appeal (page 232).

Philip B. Perlman
Solicitor General

[File Endorsement Omitted]

237 In the Supreme Court of the United States

[Title Omitted]

APPELLEES' DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED—Filed November 29, 1951

Come the appellees, pursuant to paragraph 9 of Rule 13 of this Honorable Court, and designate the following portions of the record to be printed in addition to the portions designated by appellant:

1. Count 1 of the indictment.

2. The entire motion of appellee Brashier to dismiss the indictment.

J. ED FRANKLIN
ALLAN EDWARDS
BEN F. CAMERON
J. WILL YOUNG
WILL S. WELLS
FRED BERGER
CLARENCE R. SCALES
BIDWELL ADAM
ALBERT S. JOHNSTON
W. W. DENT
E. B. TODD
T. J. WILLS
ROBERT W. THOMPSON, JR.
W. S. HENLEY

238 Certificate of service (omitted in printing)

239 In the Supreme Court of the United States

APPELLEE'S SUPPLEMENTAL DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED—Filed November 29, 1951

Come the appellees, and designate the following portions of the record to be printed in addition to the portions designated by appellant and in addition also to the portions heretofore designated by appellees:

1. The notice served on appellees (evidently being the notice appearing at page 214 of the typewritten record), together with acknowledgment of service of said notice by Ed Franklin, attorney for defendant Brashier, Will Wells, attorney for defendant Forrest Jackson, Allan Edwards, attorney for defendant Wilkinson, Bidwell Adam, attorney for defendant Rogers, W. W. Dent, attorney for defendant McLeod, R. W. Thompson, Jr., attorney for defendant

Mize, W. S. Henley, attorney for defendant Hood, A. F.
240-241 Summer, attorney for defendant Beasley.

J. Ed. Franklin,
Allan Edwards,
Ben F. Cameron,
J. Will Young,
Will S. Wells,
Fred Berger,
Clarence R. Scales,
Bidwell Adam,
Albert S. Johnston,
W. W. Dent,
E. B. Todd,
T. J. Wills,
Robert W. Thompson, Jr.,
Ben F. Cameron.

Certificate of Service (omitted in printing).

242 Supreme Court of the United States. October Term, 1951

No. 426

[Title omitted]

Order Noting Probable Jurisdiction—December 3, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

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No. 426

NOV 13 1951

In the Supreme Court of the United States

October Term, 1951

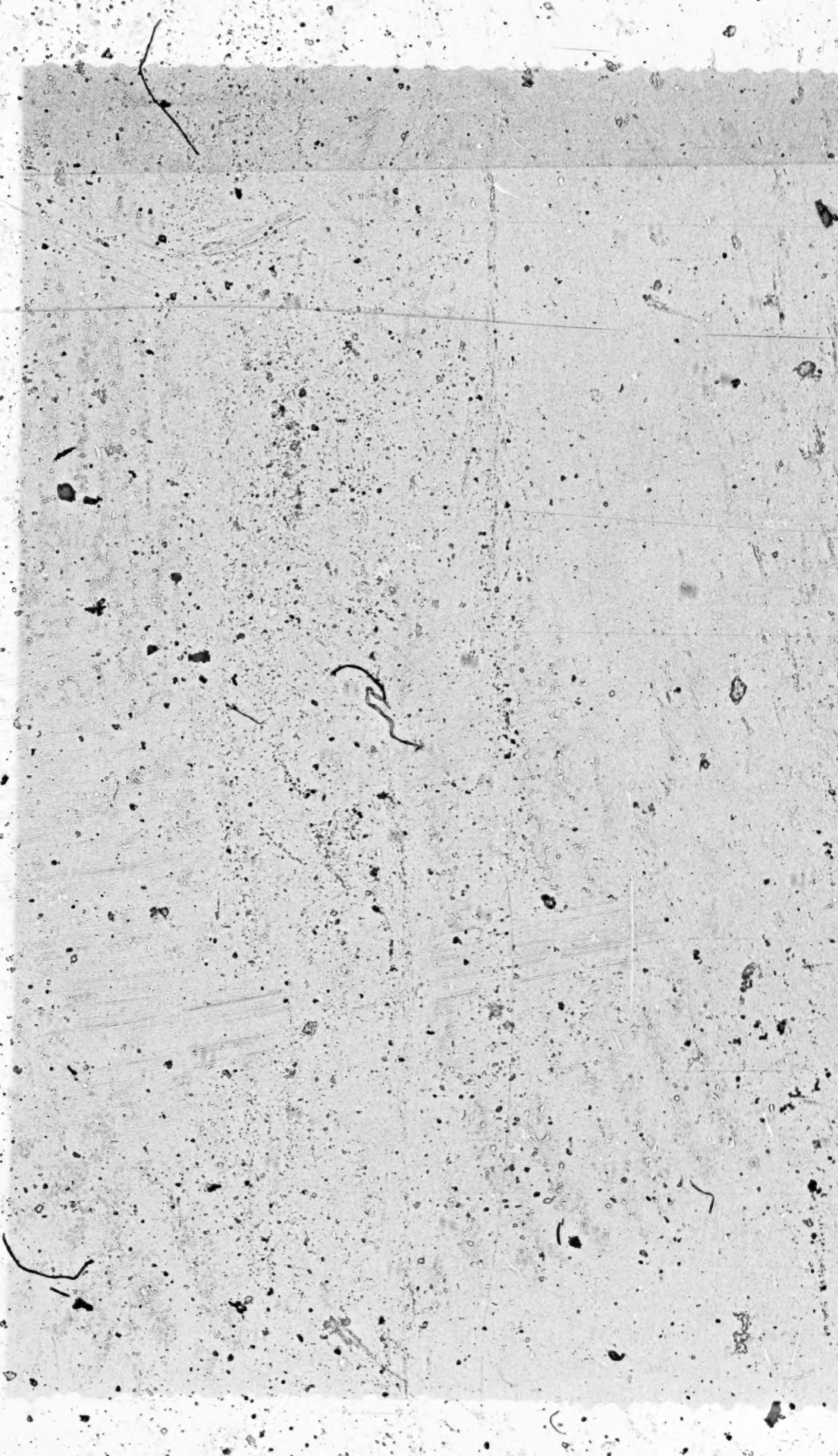
THE UNITED STATES OF AMERICA, APPELLANT

vs.

CHARLES H. BOOL, JR., FRANK P. ALEO, BROOM C. [illegible], ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

STATEMENT AS TO JURISDICTION



IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 2164

UNITED STATES OF AMERICA

v.

CLARENCE E. HOOD, JR., ET AL.

STATEMENT AS TO JURISDICTION

(Filed October 4, 1951)

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, and Rule 37(a) of the Federal Rules of Criminal Procedure, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the indictment as to defendants Roy F. Brashier and James H. Wilkinson.

OPINION BELOW

The order of the District Court dismissing the indictment is not reported. A copy of the order, which states the grounds of the dismissal, is attached hereto as an Appendix.

JURISDICTION

The order of the District Court, dismissing the indictment was entered on September 5, 1951. The jurisdiction of the Supreme Court to review on

direct appeal the decision of the District Court dismissing counts of an indictment where such dismissal is based on the construction of the statute on which the indictment is founded is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. See also Rule 37(a)(2), F. R. Crim. P. The following decision sustains the jurisdiction of the Supreme Court: *United States* v. *Lem Hoy*, 330 U. S. 724.

QUESTION PRESENTED

Whether the solicitation and receipt of political contributions in consideration of a promise to obtain appointment to a federal office which at the time of solicitation is non-existent, but the creation of which has been made possible by existing law, constitutes a violation of 18 U.S.C. 215.

STATUTE INVOLVED

Section 215, 18 U.S.C. (62 Stat. 694) provides:

> Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

On July 19, 1951, an indictment, containing 34 counts was returned against twelve defendants, including Roy F. Brashier and James H. Wilkinson, in the United States District Court for the Southern District of Mississippi. Count one charged all the defendants with a conspiracy to violate 18 U.S.C. 215, by selling, on behalf of the Mississippi

Democratic Committee, appointments to offices in the Post Office Department and the Office of Price Stabilization. The remainder of the counts charged the defendants, singularly, with the commission of specific substantive offenses. Counts 31 and 32 charged that on February 8, 1951, Brashier had committed two such substantive offenses, and count 33 charged that Wilkinson committed one such offense on February 5, 1951, in that they, severally, "did knowingly, wilfully and unlawfully solicit from" different individuals named stated sums of money "in consideration of the defendant's promise of support and use of influence in obtaining for" the named individuals "an appointive office and place under the United States, namely, an appointment as Chairman of the County Ration Board to be set up and created under the Office of Price Stabilization in" certain specified counties in Mississippi.

Following a motion by all the defendants, the trial court, on September 5 1951, after "taking judicial notice that no office or place of Chairman of the County Ration Board under the Office of Price Stabilization for the District of Mississippi had been created or was in existence during the period of time covered by the indictment," ordered "the indictment dismissed as to the defendant Roy F. Brashier on Counts 31 and 32; and * * * as to defendant James H. Wilkinson on Count 33 of said indictment." All portions of Count 1 (conspiracy count) of the indictment dealing with offices or places as Chairman or Supervisor of County Ration Boards under the Office of Price Stabilization and the overt acts thereunder dealing with such

offices or places were ordered to be stricken as surplusage.

THE QUESTION IS SUBSTANTIAL

The District Court, in dismissing the indictment as to Brashier and Wilkinson, ruled, in effect, that Congress did not intend 18 U.S.C. 215 to be so broad in scope as to cover the sale of potential federal jobs. Thus, the issue presented by this appeal is important in the enforcement of the laws designed to prevent corruption of the federal service. In enacting emergency legislation Congress usually provides for the creation of a temporary central agency and the establishment of various offices thereunder, in order to effectuate the legislative purpose. The number and type of offices to be established is usually made contingent upon the predictability of certain events. Under the decision of the District Court the Government would be powerless to punish the sale of federal offices authorized by law, but not yet actually put into existence.

The broad language of 18 U.S.C. 215 seems to cover the sale of potential jobs involved in the instant case. It prescribes the sale of "*any* appointive office or place under the United States." (Italics supplied.) The fact that an office has not yet been created is not the determinative factor in the scope of the statute. If money is paid to obtain

[1] Compare the provisions of 18 U.S.C. 600, which makes it a misdemeanor for anyone to promise "any employment, position, work, compensation, or other benefit, *provided for or made possible in whole or in part* by any Act of Congress" for political activity during an election. (Italics supplied.) We feel that the italicized portion refers to an established office or employment, or one reasonably expected in the near future.

an office which all parties have reason to believe will be established in the near future, such a transaction would seem clearly to violate the intent of the statute. The evil sought to be avoided by Section 215 was corruption in federal service by having appointments given, not to an individual most qualified, but to one with greater financial influence.[2] The statutory purpose clearly makes the statute just as applicable to promises to obtain federal offices which have not yet been created but the existence of which has been made possible by an Act of Congress, as to offices actually in existence.

The offenses covered by the section here involved are analogous to offenses of false personation prohibited by 18 U.S.C. 912, under which the offense is complete when one obtains a thing of value while pretending to act as an officer of the United States, even though there is no office established by law to which pretense is made. *United States* v. *Barnow*, 239 U. S. 74, 77; *Elliott* v. *Hudspeth*, 110 F. 2d 289 (C. A. 10); *Brassfield* v. *United States*, 259 Fed. 511 (C. A. 6); compare *Ehlert* v. *United States*, 167 F. 2d 380 (C. A. 1). False pretense of federal authority with an intent to defraud tends to detract from the respect and dignity of the Government

[2] The purpose of the bill was at the time of its enactment stated to be as follows:

"This bill seeks to punish the purchase and sale of public offices. Certain Members of Congress have brought to the attention of the House both by speeches on the floor and statements before the Judiciary Committee a grave situation, disclosing corruption in connection with postal appointments in Mississippi and South Carolina. It is believed that this bill will prevent corrupt practices in connection with appointments in the near future." (H.R. No. 1366, 69th Cong., 1st sess.)

and its officers generally. *United States* v. *Barnow*, supra, at 78. Similarly, the promise to procure a non-existent, but a reasonably possible office tends to corrupt the federal service and lower its esteem in the eyes of the public. The sale of a potential federal office has a direct relation to the general well being of the federal service which Congress has the power to regulate. Cf. *United States* v. *Ferger*, 250 U. S. 199, 203.

In enacting the Defense Production Act of 1950 (64 Stat. 798, *et seq.*, 50 U.S.C. App. 2061, *et seq.*) Congress unquestionably gave the President authority to establish, among other things, a system of rationing. The preamble to the Act stated that it was designed "To establish a system of priorities and allocations for materials and facilities, authorize the requisitioning thereof, provide financial assistance for expansion of productive capacity and supply, provide for price and wage stabilization, provide for the settlement of labor disputes, strengthen the controls over credit, and by these measures facilitate the production of goods for the national security, and for other purposes." In accordance with the authority granted him, the President had established the Office of Price Stabilization, and named its national director. Rationing could be established when need therefor arose and the prior experience during World War II would lend credence to the expectation that it would be handled by county boards. Thus the corruption charged in the instant indictment related to potential federal positions authorized by Act of Congress.

The respect and confidence which underlies the federal service would clearly be undermined by an unrestrained practice of selling federal jobs which are not actually in existence, but the establishment of which is within the reasonable expectation of the public. It is submitted that the decision of the District Court is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted,

(S.) PHILIP B. PERLMAN,
Solicitor General.

(S.) JOSEPH E. BROWN,
United States Attorney,
Southern District of Mississippi.

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No. 426

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, *Appellant*

v.

CLARENCE E. HOOD, JR., ET AL., HOY F. BRASHIER AND JAMES H. WILKINSON

On Appeal from the United States District Court for the Southern District of Mississippi

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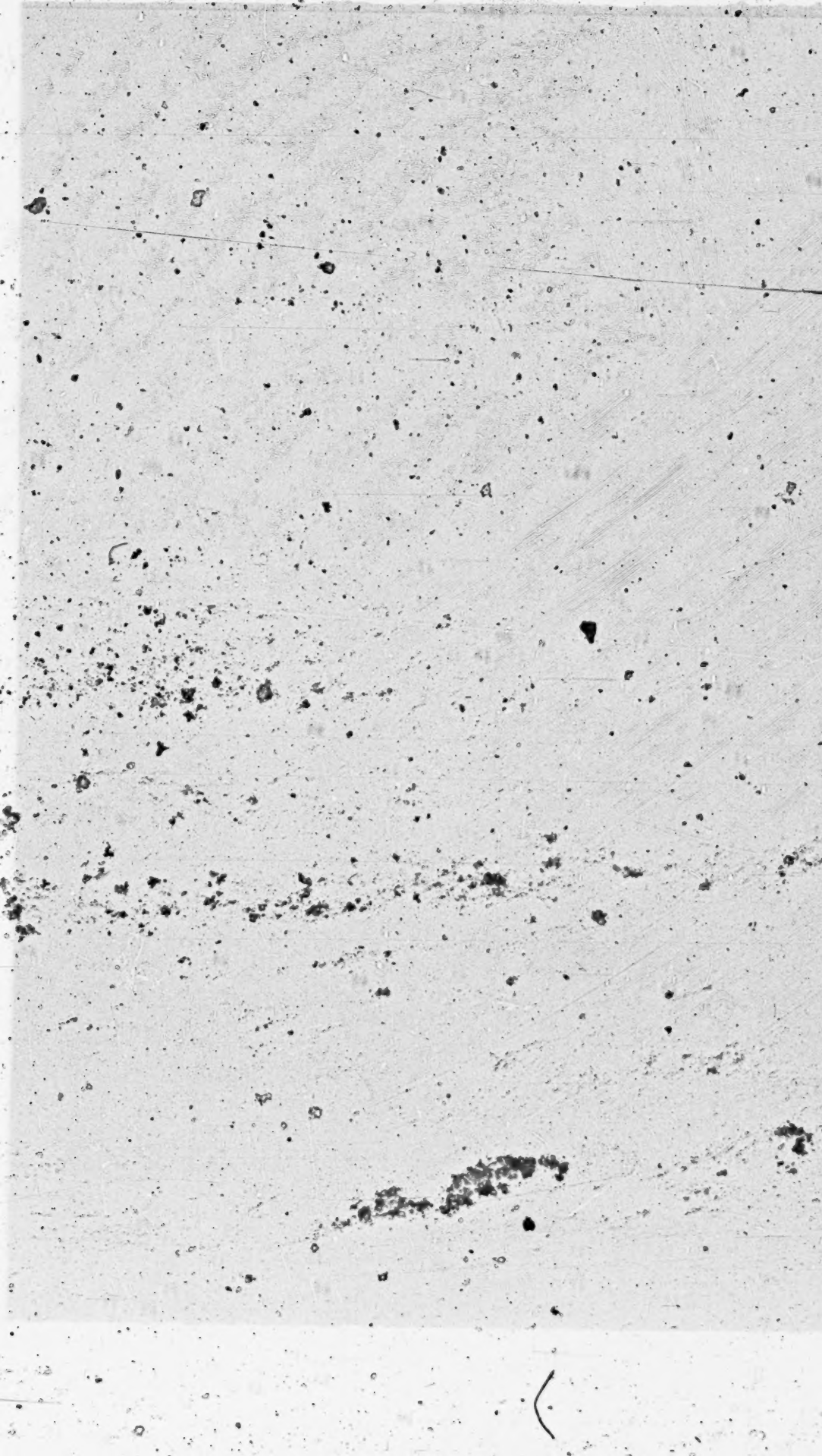
BRIEF FOR THE UNITED STATES



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New York Times, January 19, 1951, p. 1, col. 5 24
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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 426

UNITED STATES OF AMERICA, *Appellant*

v.

CLARENCE E. HOOD, JR., ET AL., ROY F. BRASHIER AND JAMES H. WILKINSON

On Appeal from the United States District Court for the Southern District of Mississippi

---

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court did not write an opinion. The court's order dismissing counts 31, 32, and 33 of the indictment (R. 14-15) is not reported.

JURISDICTION

The order of the District Court dismissing counts 31, 32, and 33 of the indictment was entered on September 6, 1951 (R. 14-15). The United States filed its notice of appeal on October 4, 1951 (R. 15), and this Court noted probable jurisdic-

tion on December 3, 1951 (R. 21). The jurisdiction of this Court is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

18 U.S.C. 215 makes it unlawful to solicit political contributions in consideration of the promise of support or use of influence in obtaining for any person "any appointive office or place under the United States." The question is whether it is a good defense to a prosecution under this statute that at the time of the alleged solicitation the promised federal job, although it could be created under authority of existing law, did not actually exist.

STATUTES INVOLVED

18 U.S.C. 215 (62 Stat. 694) provides:

> Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As originally enacted as the Act of December 11, 1926, c. 3, Section 2, 44 Stat. 918, 18 U.S.C. (1946 ed.) 150, the statute provided:

It shall be unlawful to solicit or receive from anyone whatsoever, either as a political contribution, or for personal emolument, any sum of money or thing of value, whatsoever, in consideration of the promise of support, or use of influence, or for the support or influence of the payee, in behalf of the person paying the money, or any other person, in obtaining any appointive office under the Government of the United States.*

STATEMENT

On July 19, 1951, an indictment containing 34 counts was returned against twelve defendants, including appellees Roy F. Brashier and James H. Wilkinson, in the United States District Court for the Southern District of Mississippi. Count 1 charged all the defendants with a conspiracy to violate 18 U.S.C. 215, by selling, on behalf of the Mississippi Democratic Committee, appointments to offices in the Post Office Department and the Office of Price Stabilization (R. 1-8). The remainder of the counts charged the defendants individually with the commission of specific substantive offenses. Counts 31 and 32 charged that appellee Brashier had committed two such sub-

* Section 1 of the 1926 Act, the substance of which is now codified in 18 U. S. C. 214, provided "That it shall be unlawful to pay or offer or promise to pay any sum of money, or any other thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence, whatsoever, to procure any appointive office under the Government of the United States for any person whatsoever."

stantive offenses, and count 33 charged that Wilkinson committed one such offense, in that each "did knowingly, wilfully, and unlawfully solicit from" different named individuals stated sums of money "in consideration of the defendant's promise of support and use of influence in obtaining for" the named individuals "an appointment as Chairman of the County Ration Board to be set up and created under the Office of Price Stabilization in" certain specified counties in Mississippi (R. 8-9).[1]

Following motions to dismiss by the appellees (R. 9-14), the trial court, "taking judicial notice that no office or place of Chairman of the County Ration Board under the Office of Price Stabilization for the District of Mississippi had been created or was in existence during the period of time covered by the indictment", ordered "the indictment dismissed as to the defendant Roy F.

[1] The indictment was the result of an investigation conducted by a subcommittee of the Senate Committee on Expenditures in the Executive Departments. See S. Rep. No. 445, 82nd Cong., 1st sess.

[2] It was stipulated by counsel for both sides that "no office or place under the United States known as Supervisor or Chairman of a County Rationing Board under Office of Price Stabilization for the District of Mississippi either in February 1951 and up to and including the date of the return of the indictment herein has been established, set up, or designated in the State of Mississippi, nor has any such office, place or position on a county level been established, set up or designated in the State of Mississippi during either the month of February, 1951 and up to and including the date of the return of the indictment herein." (R. 14).

Brashier on Counts 31 and 32, and * * * as to defendant James H. Wilkinson on Count 33 of said indictment". All portions of count 1 (the conspiracy count) dealing with offices or places as Chairman or Supervisor of County Ration Boards under the Office of Price Stabilization and the overt acts alleged dealing with such offices or places were ordered stricken as surplusage. (R. 14-15.)

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that 18 U.S.C. 215 applies only to presently existing appointive offices and not to the sale of potential federal offices authorized by law but not yet actually created, such as the office of Chairman of the County Ration Board under the Office of Price Stabilization, for the District of Mississippi, involved in this case.

2. In dismissing counts 31, 32 and 33 of the indictment.[3]

[3] The Government's notice of appeal inadvertently stated that the appeal is from the order of the District Court "dismissing the indictment" (R. 15). This appeal under the Criminal Appeals Act, 18 U.S.C. 3731, does not bring up for review, except indirectly, the District Court's action in respect of the conspiracy count, for the Court did not dismiss that count, but only struck certain of its allegations as surplusage. The other substantive counts which were not dismissed and the individual defendants named therein are also not before the Court. The named appellees other than Brashier and Wilkinson have, therefore, only a nominal participation in this appeal, which is limited to the correctness of the District

SUMMARY OF ARGUMENT

I

The alleged solicitation of political contributions by appellees in return for promises to obtain for the contributors appointments to federal positions under the Office of Price Stabilization directly violated 18 U.S.C. 215. The District Court's ruling that the statute applies only where the specific jobs sold are actually in existence is an unjustifiably narrow construction which finds no support in the legislative history, language, or purpose of the statute.

The original act was passed in 1926 to prevent the sale of federal patronage by political bosses who were not answerable to the people, an evil which Congress found threatened the prestige of Government. The activities with which appellees are charged tend to destroy the confidence of the people in their Government, and are in no way less destructive of public confidence because the particular federal positions attempted to be sold turn out to be non-existent. The legislative history of the statute makes it apparent that the solicitations here involved are the very type which Congress intended to proscribe.

Court's construction of 18 U.S.C. 215 as inapplicable to the sale of potential federal offices authorized by law but not yet actually created. "The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, 308 U. S. 188, 193.

Both the language and history of the statute show that the essence of the offense is the *solicitation*, the sale or attempted sale of political influence, for jobs to be filled in the future. The crime is complete when the solicitation is made, even though the solicitee never obtains the promised office, and even though the office is in fact either not vacant or non-existent. So far the evils at which the statute is aimed are concerned, there is no difference between trafficking in an existing job which is not yet vacant—to which the statute unquestionably applies—and a contemplated job which has not yet been created. The seller of federal patronage should not be allowed to plead as a defense that he is innocent because he could not in fact deliver what he purported to sell.

When this Court held in *United States* v. *Barnow*, 239 U.S. 74, that 18 U.S.C. 912, punishing false personation of a federal officer, is violated even though the pretended position is not in existence, it reasoned that the integrity of the federal Government is equally harmed by pretense to existent or non-existent office. The same reasoning is applicable here. The integrity of the federal Government is injured by the sale of political influence to secure what the defendant describes as a federal appointive position, whether or not such a position actually exists. It is the trafficking in federal patronage, whether the jobs are or are not yet actually available, which Congress made a crime.

II

Assuming that under 18 U.S.C. 215 the federal position sold must have some actuality, it is submitted that, in the circumstances of this case, the statute applies. Appellees sought to barter a federal office similar to the one which had been in existence in Mississippi only a few years previously. Recent federal emergency legislation, and executive orders issued thereunder, regarded in the light of the history of the World War II experience, made it a substantial possibility when the acts here involved occurred, that a rationing system would be set up in the near future under the Office of Price Stabilization. The sale of an office which undoubtedly appeared to all parties to be so imminent was the sale of a federal office within the purview of 18 U.S.C. 215.

ARGUMENT

I

18 U.S.C. 215 Does Not Require That the Appointive Office or Place be in Existence at the Time It Is Promised in Return for the Payment of Political Contributions

The District Court ruled that 18 U.S.C. 215 did not contemplate the sale of appointive offices not presently in existence. This narrow construction, which is not supported by any previous decisions construing the statute, substantially defeats one of the principal purposes behind its enactment—the protection of the integrity and prestige of the federal Government. The language and the legislative history of the statute leading up to its pas-

sage in 1926 make it clear that Congress was aroused over the wholesale corruption in federal patronage in some states, and that the statute was primarily directed at solicitations—the sale or attempted sale of federal jobs—without regard to whether the jobs bartered were actually obtained or whether they in fact were vacant or actually existed.

The language of the statute bears this out. The essential criminal act is the "promise of support or use of influence in obtaining for any person any appointive office or place under the United States." The statute does not make it necessary for the accused to obtain appointment for the bidder—he need only *promise* to do so. The offense is a present promise of future assistance, in obtaining a federal job in the future. There is thus no reason to believe that the statute is concerned merely with offices existing or vacant at the time of the promise. Congress deliberately phrased the statute to take care of the evil with which it was principally concerned—the *sale of influence*. The crime is complete when, as here, there is a solicitation of money in consideration for a promise of support or influence in obtaining a federal job in the future, regardless whether there is in fact an existing vacancy to be filled or whether the "purchaser" actually takes office or whether there is an actual job in existence which could be sold. So far as the crime defined by Congress is concerned, there is no difference between an existing job which is

not yet vacant—as to which the statute unquestionably applies—and a contemplated job which has not yet been created. In neither situation should the seller be allowed to plead as a defense that he could not make good on his promise because the position "sold" did not in fact exist.

The situation in 1926 which caused Congress to enact the statute now codified as 18 U.S.C. 215 was almost identical with the situation which spurred the investigation [4] culminating in the pres-

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[4] The Senate subcommittee (see footnote 1, *supra*) reported (S. Rep. No. 445, 82nd Cong., 1st sess.) that, after the appearance of the States Rights group in the 1948 election, the Democratic National Committee stopped conferring with the Mississippi congressional delegation on patronage matters (pp. 1-2). Instead, a self-appointed Mississippi Democratic Committee, which had not been legally organized in accordance with the provisions of the Mississippi election laws, designated one of its leaders, Clarence E. Hood, Jr., as chief patronage adviser in the State of Mississippi.

During the latter part of 1950, when the Office of Price Stabilization was organized, see pp. 20-25, *infra*, and a State director appointed for Mississippi, the Mississippi Democratic Committee, assuming that a system of rationing would be set up as in World War II, hired defendants Brashier, on a full-time basis, and Wilkinson, on part-time, to enter into agreements with certain persons whereby these persons, for the payment of a political contribution, would be appointed contact men for the Democratic Party in various counties throughout the State (pp. 25, 27). Although these contact men would serve without pay, they would be in a position to give federal jobs to persons of their own choice (p. 26). On the basis of testimony before it, the subcommittee concluded that these so-called "contact men" were promised that they would be appointed to or would control the appointment of county positions in the Office of Price Stabilization (p. 30).

ent prosecution. Then, as allegedly in this case, a few political bosses had been given control by a national political organization over the disposition of federal jobs. As a result, Congress enacted the statute here involved, making the sale of federal offices unlawful. The problem existing then was that of persons, authorized by the political organization to dispose of patronage in federal positions, selling this patronage to the highest bidder. This is the very same situation here. The harm to the integrity of the Government is not affected by the existence or non-existence of the jobs which are sold, but is brought about primarily by the practice of bartering in federal jobs, whether such jobs are actually vacant or existent. Thus, Congressman Busby in bringing to the attention of the House the situation in Mississippi which permitted a local political boss to control all federal patronage and sell it to the highest bidder, stated as follows (67 Cong. Rec. 5847):

> In my particular state — Mississippi — so corrupt, open, and notorious has been the practice of barter and sale of Federal positions from the humblest place of postmaster or rural letter carrier to the most important appointive Federal positions in the State, that self-respecting, decent citizens shudder to think of the humiliation into which the State has been dragged by those who would debauch the reputation of their country and sell its

good name in order that they might be personally enriched by the sale of Federal patronage.

The Report of the Judiciary Committee makes it clear that these considerations caused it to recommend passage of the bill. The Report (H. Rep. 1366, 69th Cong., 1st Sess.) states:

> This bill seeks to punish the purchase and sale of public offices. Certain Members of Congress have brought to the attention of the House both by speeches on the floor and statements before the Judiciary Committee a grave situation, disclosing corruption in connection with postal appointments in Mississippi and South Carolina. It is believed that this bill will prevent corrupt practices in connection with patronage appointments in the future.

It is important to note that the House report speaks only of corruption in patronage appointments, and makes no mention of the existence or non-existence of the jobs. While the statute also has the effect of preventing incompetent office holders from actually succeeding in buying and holding positions under the bidding system, this was not the main purpose of the bill. The history of the statute and the declared policy of Congress make it clear that the main purpose was to end once and for all the sales of *patronage*—which of

course includes not only present jobs expected to be vacated but future jobs not yet created—which brought disrepute to the Federal Government.

In 1926, at the very same time that Congress was considering the predecessor of the present statute, it had before it a bill (H.R. 10770) introduced about the same time (67 Cong. Rec. 6483):

> to make unlawful the acceptance or solicitation of campaign or political funds, under certain circumstances, the acceptance of pay for political help, *the acceptance of certain Federal positions secured by parties after making such payments or donations, and for other purposes.* [Emphasis added.]

That the predecessor of the present statute was passed in preference to this bill is further evidence that it was the sale of influence, rather than actual filling of the position, that constituted the primary evil against which the statute was directed.

If the statute is construed as entirely inapplicable to the sale of federal jobs which have not yet been created, there will be a large area in which the legislative purpose will be frustrated, for very frequently federal offices are created and filled simultaneously. If the appellees had promised "For $500 we will, in the event that X position becomes vacant, use our influence to get it for you", no one could doubt that the statute had been violated. In what way does that case differ from a

promise: "For $500, we will, in the event that X position is created, use our influence to get it for you"? In either event there is a trafficking in positions expected to become available in the future. Indeed the second type of promise probably represents the more serious threat to the integrity and prestige of the Government. The greatest opportunities for both job-hunters and dispensers of patronage are those offered by new positions, which are often created in substantial numbers and whose creation can to some extent be anticipated and predicted, rather than by vacancies in existing positions, which typically arise singly and often cannot be anticipated. Moreover, the recipient of a new position is frequently chosen before the position has been created, so that he may enter in office immediately on its creation.

The statute would thus fail to meet a major part of the evil at which it is directed if it were limited to promises of existing positions. The anomaly of such a limitation is emphasized by the fact that the nature of the particular position sold is normally not of primary importance to either the seller or the purchaser. If a particular position should prove unavailable, the promissor would normally be expected and would normally be obliged to use his influence to obtain for the payee some other equivalent position.[5] The evil from the

[5] S. Report No. 445, supra, indicates that those who contributed money to appellees were not primarily inter-

sale of patronage would remain. That evil arises wherever federal appointive positions—whether presently available or expected to become available—are treated as articles of commerce.

Statutes, even though criminal, which are designed to accomplish a broad social objective, are to be construed in a manner which will accord with their basic purpose. *United States* v. *Dotterweich*, 320 U.S. 277, 280; *United States* v. *Lacher*, 134 U.S. 624, 628. "We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward*, 279 U.S. 337, 339.

In *Hoeppel* v. *United States*, 85 F. 2d 237 (C.A.

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ested in the job of chairman of the county ration board, but had been induced to enter the agreement by the promise of appellees that they would be given a position which would enable them, in turn, to give federal jobs to their friends. The Report stated (p. 27):

"* * * Mr. Harvey said that he was in no way interested in the rejuvenation of the Democratic Party in Mississippi and that he was not interested in making a contribution to the Democratic Party or to any other party in the amount of $300. But, when he was advised by Mr. Brashier that certain patronage would be his, he became interested in several friends who would like to have jobs, *and for this reason he went along with the idea as outlined by Mr. Brashier* and made out his check in the sum of $300 payable to the Mississippi Democratic Committee. Stories similar to that of Mr. Harvey were testified to before the subcommittee by Mr. T. B. Wilkins, Mr. A. F. Pylant, and Mr. Philip H. Brasfield." (Emphasis added.)

D.C.), certiorari denied, 299 U.S. 557, the defendants sought to read into this statute the word "civil" before the words "appointive office" in an effort to prevent its application to the sale of an appointment to the Corps of Cadets at West Point. The Court of Appeals of the District of Columbia held that this could not be done. It said, at p. 241, "It is broad and sweeping in its terms, applying to all appointive offices, without qualification." In like manner, appellees in the instant case seek to read into the statute the qualifying words "presently existing" before the words "appointive office." They should be no more permitted to restrict the scope of the statute than were the defendants in the *Hoeppel* case.

That the present statute is to be given a broad construction to accomplish its underlying policy has been declared by the revisers of the Criminal Code in modifying the language of the original provision (*supra*, p. 3) for its enactment as Section 215 of Title 18. In explaining the addition of the words "or place" to Section 215, the reviser stated: "Term 'or place' was inserted after words 'appointive office' in order to give broader scope to the section." Reviser's Note following 18 U.S.C. 215.

In 1926, when Congress passed the predecessor of the instant statute, this Court had already construed a very similar statute, now 18 U.S.C. 912, which provides for the punishment of personation

of a public officer,[6] without specifying whether the pretended office must actually exist or not. In *United States* v. *Barnow*, 239 U.S. 74, it was held that the statute was violated even though the type of office or employment to which the defendant pretended did not exist. In light of this holding and the underlying purpose of Section 215, Congress could well have believed itself secure in adopting similarly unqualified language in the present statute.

The reasoning adopted by the Court in the *Barnow* case is equally applicable here. There the defendant had represented himself as being employed by the Government to sell a book entitled "Messages and Papers of Presidents". In fact no such employment or activity on the part of the Government existed. As in the present case, the District Court in the *Barnow* case dismissed the indictment, ruling that the statute there involved contemplated only a type of employment that was in existence in the Government. This Court, on a direct appeal brought by the Government, reversed the District Court, saying at pp. 76-77:

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[6] 18 U.S.C. 912 reads as follows:

> "Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1000 or imprisoned not more than three years, or both."

> We think this is to read the act in too narrow a sense. Not doubting that a false personation of a particular office or employé of the Government, or a false pretense of holding an office or employment that actually exists in the Government of the United States, is within the denunciation of § 32, we think it has a broader reach. * * * *Why should it be deemed less an offense where the assumption or pretense is entirely false, as where the very office or employment to which the accused pretends title has no legal or actual existence?* (Emphasis added.)[7]

In upholding the validity of Congress' prohibition against pretense to non-existing government offices, this Court said at p. 78:

> In order that the vast and complicated operations of the Government of the United States shall be carried on successfully and with a minimum of friction and obstruction, it is important—or, at least, Congress reasonably might so consider it—not only that the authority of the governmental officers and employees be respected in particular cases, but that a spirit of respect and good-will for the Government and its officers shall generally prevail. And what could more directly

[7] Accord: *Elliott* v. *Hudspeth*, 110 F. 2d 389 (C.A. 10); *Brafford* v. *United States*, 259 Fed. 511 (C.A. 6).

impair this spirit than to permit unauthorized and unscrupulous persons to go about the country falsely assuming, for fraudulent purposes, to be entitled to the respect and credit due to an officer of the Government? It is the false pretense of Federal authority that is the mischief to be cured * * *. *Now, the mischief is much the same, and the power of Congress to prevent it is quite the same, whether the pretender names an existing or a non-existing office* * * *. [Emphasis added.]

This language aptly applies to the issues here involved. The sale of public office has an even more destructive effect on the Government, and is even more contemptible in the eyes of the public, than false pretense to public office. It should not be any less an offense that the sale is of a public office that is not presently in existence, for, like the statute involved in the *Barnow* case, the statute here has for one of its principal purposes the maintenance of the general good repute and integrity of the federal service itself. Cf. *United States* v. *Ferger*, 250 U.S. 199, 203. The danger to that good repute and dignity is particularly great in the sale of federal patronage by politicians. As the Senate report stated of the situation giving rise to the instant prosecution, S. Rep. 445, *supra*, p. 31:

> * * * Whenever the heads of any political party or administration delegate political

power, as was done in this case, to persons who are not answerable to the voters or who are not responsible even to the membership of their own political party, such action leads to the corruption of public affairs.

The sale of patronage is the evil at which the statute was directed. That evil exists whether the office sold is or is not in existence.

II

Appellees' Activities Sufficiently Related to Potentially Existing Federal Offices to Constitute a Violation of 18 U.S.C. 215

Assuming that under 18 U.S.C. 215 the federal position sold must have some actuality, a promise to use influence to obtain for the payee a federal position which, although not yet in existence, is reasonably expected to be created in the near future clearly falls within the statute. That is the situation presented by the instant indictment. The position which was the subject of the solicitation of political contributions in this case was not a wholly fictitious creation; it had sufficient reality to bring it within even a narrow construction of the statute.

On February 8, 1951, when appellees allegedly promised to obtain appointments for contributors as Chairmen of County Ration Boards under the Office of Price Stabilization, there was reason for the parties concerned to believe that such positions might be available in the near future. Con-

gress had already passed the Defense Production Act of 1950, 64 Stat. 798, 50 U.S.C. App., Supp. IV, 2061, stating in the title of the Act that it was designed:

> To establish a system of priorities and allocations for materials and facilities, authorize the requisitioning thereof, provide financial assistance for expansion of productive capacity and supply, provide for price and wage stabilization, provide for the settlement of labor disputes, strengthen controls over credit, and by these measures facilitate the production of goods and services necessary for the national security, and for other purposes.

Section 101 of Title I of the Act specifically provides that the President is authorized "(2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense." Section 403 of the Defense Production Act of 1950 further provides:

> At such time as the President determines that it is necessary to impose price and wage controls generally over a substantial portion of the national economy, he shall administer such controls, *and rationing at the retail level of consumer goods* for household and personal use under authority of Title I of this Act (when and to the extent that he exercises

such authority), through a new independent agency created for such purpose. * * * [Emphasis added.]

Pursuant to this grant of authority, the President on September 9, 1950, issued Executive Order No. 10161, 15 Fed. Reg. 6105. Section 401(a) created a new and independent agency to be known as the Economic Stabilization Agency with an Administrator at its head. Section 401(b) provided: "The Administrator shall seek to preserve and maintain the stabilization of the economy. To this end he shall: (1) Plan and develop both short and long-range price and wage stabilization policies and measures and create the necessary organization for their administration * * *". Section 402 of the Order provided that there shall be in the Economic Stabilization Agency a Director of Price Stabilization "who shall perform such functions with respect to price stabilization as may be determined by the Administrator."

It was under almost substantially similar provisions of law that a system of rationing was set up in World War II. With the Office of Price Stabilization already functioning in the beginning of 1951 and a District Office set up in Jackson, Mississippi (see 16 Fed. Reg. 987) the parallel to the World War II situation was becoming clear, particularly since during that war the rationing system was operated under a similar agency—the Office of Price Administration. In short, the en-

abling legislation to set up rationing existed at the time appellees promised the federal ration jobs, and all that was needed then, as well as today, was a determination by the responsible authorities that rationing was needed for the national defense. That this determination was not remote is indicated by the statements of Director of Price Stabilization DiSalle in the General Ceiling Price Regulation issued on January 26, 1951, p. 2 (16 Fed. Reg. 808, 810):

> Price control not only must be backed by strong fiscal and credit measures but it is equally important that it be integrated with a vigorous use of production and distribution controls. It must be clearly understood that, even if price control does a perfect job in holding the prices of individual commodities, it is powerless to ensure that the essential commodities will be produced in the right quantities. With the imposition of price controls to halt the inflationary spiral, we shall be freezing a price structure geared to relatively normal patttterns of output. Such a price structure cannot be expected to bring about the pattern of output appropriate to an advanced defense economy. Nor can price controls alone be generally administered to achieve these necessary changes in output. When we refuse to allow goods to be distributed among buyers through the wild scramble of competitive bidding in inflationary markets, we must substitute orderly means

to determine whose wants shall be met and in what amount.

We have a growing system of production and distribution controls designed to assure that defense needs shall be met. We have already begun to extend these controls to assure the production of essential civilian goods and, where necessary, their fair distribution. The experience of World War II is eloquent testimony to the need for expanding such controls. * * *

There was then, therefore, substantial basis for an expectation that a system of rationing would be set up by methods similar to those adopted in World War II.[8] The sale of positions, the actuality of which must have seemed to all parties so

[8] Anticipation that rationing boards might be established in the near future was also indicated by informal statements made by high government officials. In its report of an interview with Eric A. Johnston, Economic Stabilization Administrator, the New York Times, January 27, 1951, p. 1, column 7, stated:

"Asked if rationing would have to be imposed, Mr. Johnston replied:

'That depends. We don't know yet. We may. I am not sure as yet.'"

Similarly, the New York Times, on January 19, 1951, p. 1, column 5, quoted Charles E. Wilson, Director of the Office of Defense Mobilization, as having testified before the Senate Small Business Committee that "Consumer rationing would not be necessary 'in the near future.' 'If we produce sufficiently we may put it off indefinitely, but I wouldn't want to guarantee that', he added."

imminent, was, we submit the sale of federal office within the language and intent of 18 U.S.C. 215.

CONCLUSION

For the reasons set out above, it is respectfully submitted that the order of the District Court dismissing counts 31, 32 and 33 of the indictment should be reversed.

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FEBRUARY, 1952.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 426

THE UNITED STATES OF AMERICA,
Appellant,

vs.

CLARENCE E. HOOD, JR., FRANK F. MIZE, BASCOM C. REASLEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

STATEMENT OPPOSING JURISDICTION

W. S. Henley,
Will S. Wells,
R. W. Thompson, Jr.,
E. B. Todd,
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Allan T. Edwards,
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Ben F. Cameron,
Counsel for Appellees.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 2164

UNITED STATES OF AMERICA

vs.

CLARENCE E. HOOD, ET AL.

STATEMENT OF APPELLEES UNDER RULE 12(3)

(Filed October 18, 1951)

Come the Appellees (defendants in the court below), having been served with notice of appeal and with statement of Appellant under Rule 12 of the Rules of this Honorable Court, and file this their statement under said Rule.

1. They are advised that Appellant seeks reversal solely on the ground that the court below erred in its construction of 18 U. S. C. 215. They submit that the court below was correct in its construction of said statute.

2. The question of the validity and constitutionality of said statute was not submitted to, or considered, or passed upon by the court below solely at the instance and request of the Appellant.

3. Appellees had filed their motions to dismiss and other pleadings, as shown by the record, attacking the constitu-

tionality and validity of said statute and raising many other questions as will appear from the face of their said pleadings. Appellees were ready to present to the court below each and all of said questions and requested the court to proceed with the hearing on all of the questions raised by them. Appellant announced that it was not ready to proceed with the argument of said constitutional questions, and said other questions but requested the court to proceed to the hearing of the narrow question of the applicability of said statute to the non-existent office of Chairman of the County Ration Board under the Office of Price Stabilization in Mississippi.

4. Appellees made known at said time and at every stage of the proceedings their reliance on the constitutional questions raised by them, and the other questions set up in their pleadings and their readiness to present their argument on said questions to the court.

5. The piece-meal presentation of the issues raised by Appellees' pleadings results entirely from the choice and act of Appellant, and Appellees stand ready to present all of the questions raised by their pleadings at this time, and every other stage of the proceedings.

6. Appellees present the question of jurisdiction to this Honorable Court in firm reliance on the constitutional and other questions raised by their pleadings, and on the assumption that, if this Honorable Court should conclude that the court below erred in its decision on the application of the statute, the cause will be remanded to the court below for hearing and determination of the constitutional and other questions raised by the pleadings of Appellees.

Johnson v. *Zerbst*, 58 S. Ct. 1019, 304 U. S. 458, 82 L. Ed. 1461;

Kennedy v. *Silas Mason Company*, 68 S. Ct. 1081, 334 U. S. 249, 92 L. Ed.;

Alma Motor Company v. *Timkin, etc., Company*, 329 U. S. 129, 91 L. Ed.;

Rescue Army v. *Municipal Court of Los Angeles*, 331 U. S. 549, 91 L. Ed.;

Aircraft, etc., Corporation v. *Hirsch, et al.*, 331 U. S. 752, 91 L. Ed. 1796;

United States v. *Petrillo*, 332 U. S. 1, 91 L. Ed. 1877.

Respectfully submitted,

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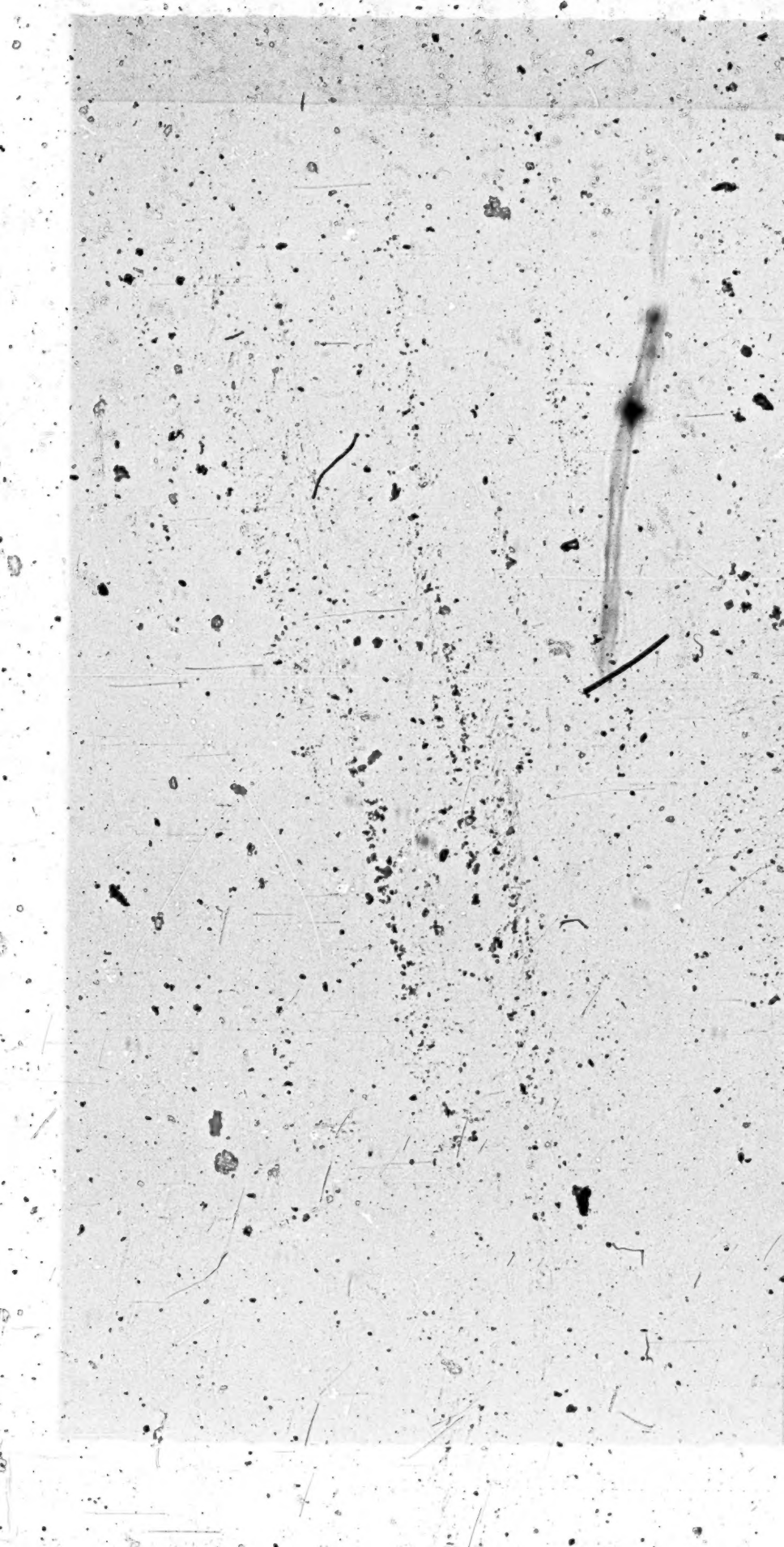

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 426

UNITED STATES OF AMERICA,
Appellant,

versus

CLARENCE E. HOOD, JR., ET AL.,
Appellees.

BRIEF FOR ROY F. BRASHIER AND JAMES H. WILKINSON, APPELLEES.

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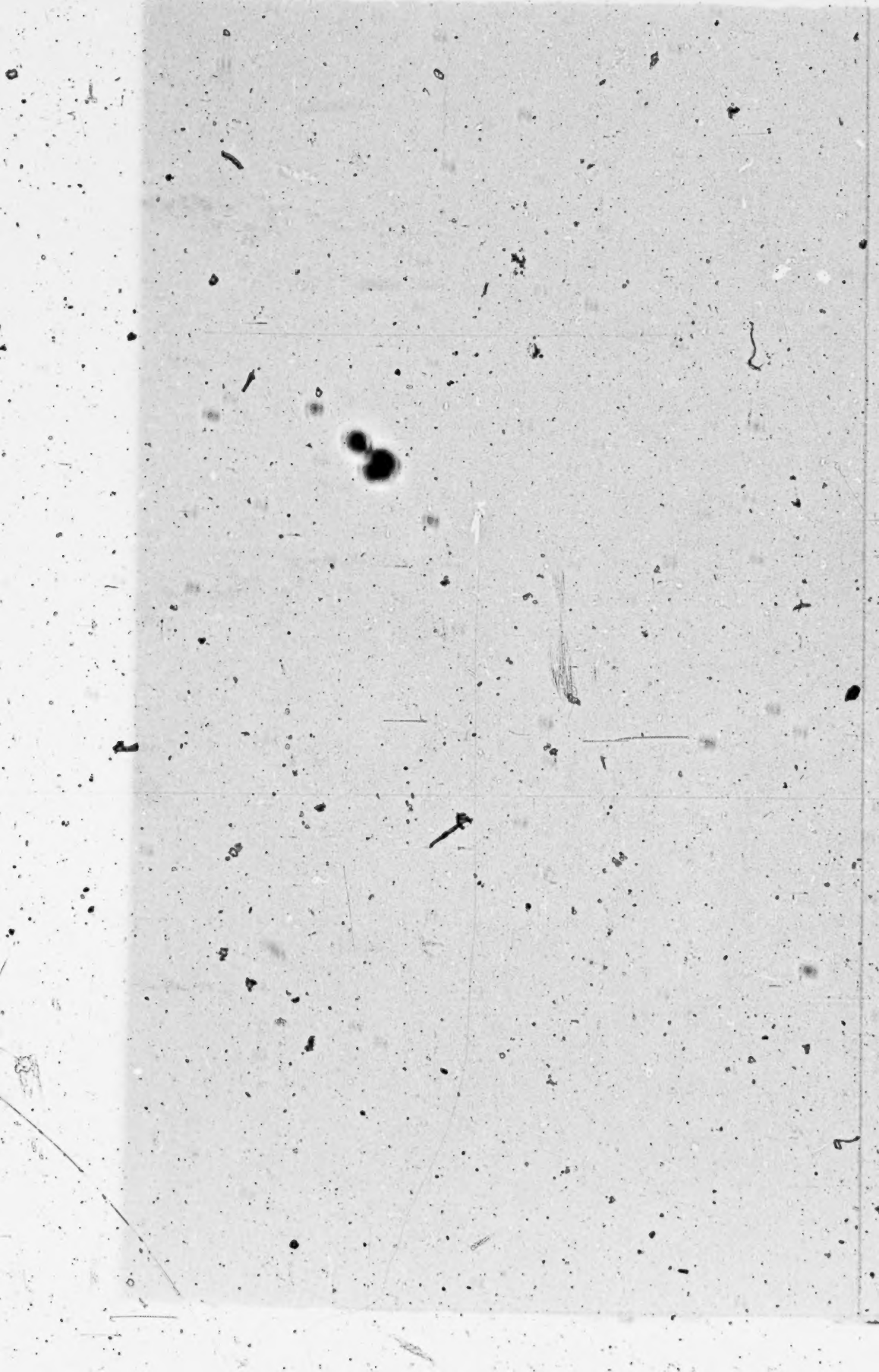

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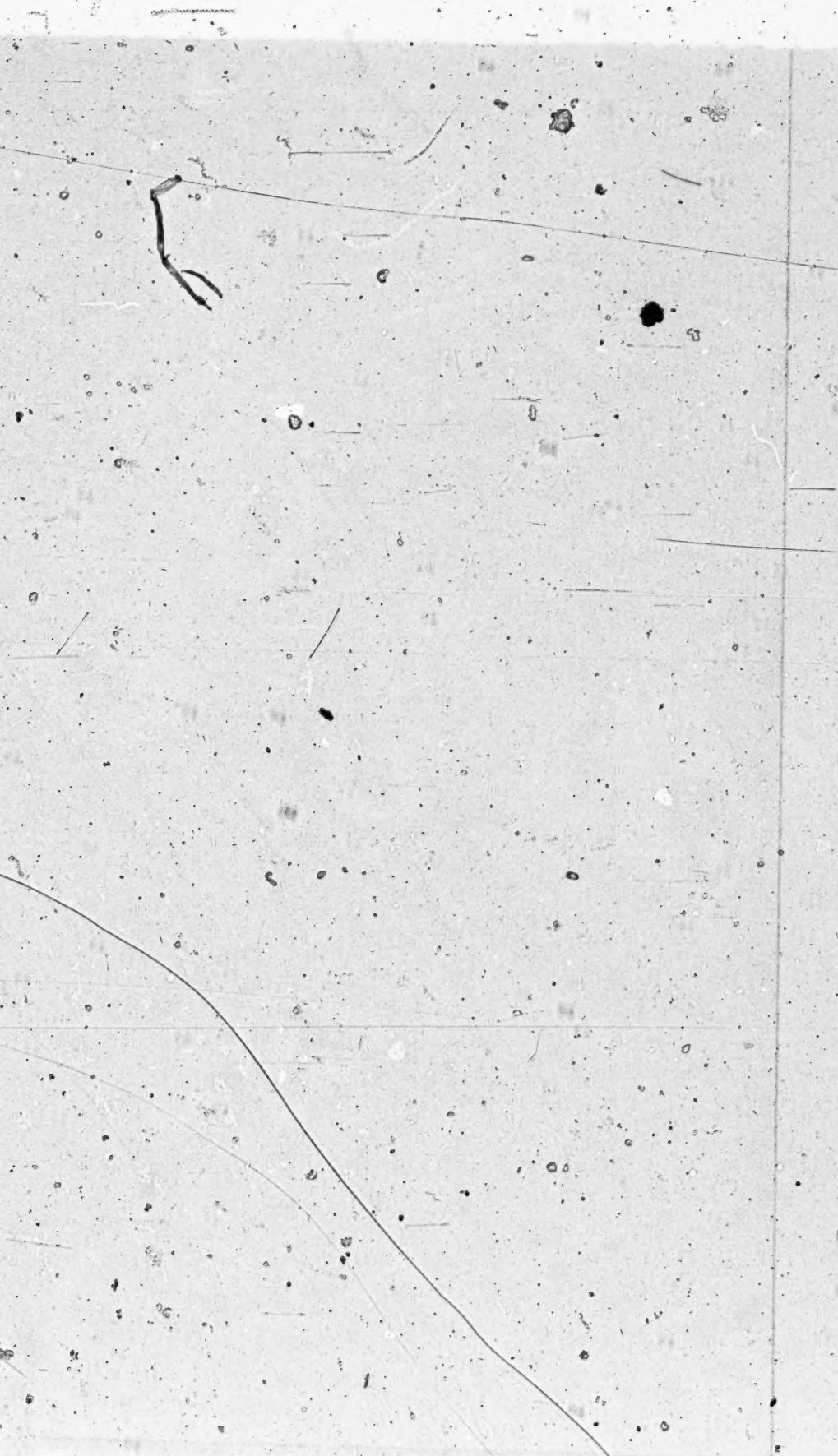

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

No. 426

UNITED STATES OF AMERICA,
Appellant,

versus

CLARENCE E. HOOD, JR., ET AL.,
Appellees.

BRIEF FOR ROY F. BRASHIER AND JAMES H. WILKINSON, APPELLEES.

Question Presented.

The question presented by this appeal is whether an indictment charging solicitation of political contributions in consideration of use of influence towards obtaining an "appointive office or place under the United States" charges a crime under 18 U. S. C. 215 when it was admitted that there was no such appointive office or place as that sought to be described in the indictment.

The indictments charged (see e. g. count thirty-one, R. 8),

> "That . . . . Roy F. Brashier did . . . solicit from Early Gray Harvey, as a political contribution, the sum of three hundred dollars in consideration of the defendant's promise of support and use of influence in obtaining . . . an appointive office and place under the United States, namely, an appointment as chairman of the County Ration Board to be set up and created under the Office of Price Stabilization . . ."

The statute, Section 215, forbids the prescribed acts only in connection with obtaining "any appointive office or place under the United States."

The court below sustained the motion to dismiss counts thirty-one, thirty-two, and thirty-three (R. 8-9), because the parties had stipulated (R. 14), and the court knew judicially that there was no such appointive office or place as that described in these counts of the indictment.

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta v. New Jersey*, 306 U. S. 451, 453, 83 L. Ed. 888, 890.

ARGUMENT.

I.

The Solicitation Prescribed by 18 U. S. C. 215 Relates Solely to an Actual Appointive Office or Place Under the United States.

The action of the court below was predicated upon a construction of the statute on which the indictments were based. It looked to the language of the statute, interpreted in the light of its context and history, and from that language so interpreted ascertained the will of congress. The court below was interpreting a penal statute and strict construction was required. It was not permitted to depart from the words and context of the statute to endeavor to extend its terms to a conjectured case clearly beyond its terms. In so doing, the court proceeded on sound ground and reached a judgment manifestly correct.

In the court below the government placed its sole reliance on the *Barnow* case and that case is the chief one relied on here and will have detailed consideration.

United States v. Barnow 239 U. S. 74, 60 L. Ed., 155.

In that case this court set itself the task of determining what the statute before it meant. That is always the task of the court. It sought to learn that meaning from the words used in the statute interpreted in the light of the underlying purpose of the statute.

The statute then under consideration (now 18 U. S. C. 912) was a false pretense statute. Barnow had pretended to be a federal officer, occupying a fictitious office which had no existence. The question was whether the fact that the office was fictitious and not real would exculpate Barnow from the results of his false pretense. In other words, the court was called upon to decide whether one who perpetrates a small deception should be punished while the perpetrator of the larger deception should go free.

This court was not considering at all whether it would extend the language of that statute so as to include a state of facts not embraced in the statute as congress had written it. Its only task was to look to the language of congress and decide its meaning in the light of the purpose of the statute.

The court concluded that false pretense was the essence of the statute and that congress intended that one falsely pretending to be a fictitious officer was covered by the statute as fully as one falsely pretending to be a real officer. A look to the language of that opinion will demonstrate that this is correct (239 U. S. 76-7, 60 L. Ed., 156-7):

> "Not doubting that a false personation of a particular officer or employee of the government, . . . is within the denunciation of Section 32, we think it has a broader reach. No convincing reason is suggested for construing it more narrowly than the plain import of its language. To 'falsely assume or pretend to be an officer or employee acting under the

authority of the United States, or any department, or an officer of the government thereof,' is the thing prohibited. One who falsely assumes or pretends to hold an office that has a *de jure* existence is admittedly within its meaning. That is, where the assumption or pretense is false in part, but contains a modicum of truth, the statute is violated. Why should it be deemed less an offense where the assumption or pretense is entirely false, as where the very office or employment to which the accused pretends title has no legal or actual existence? . . . it would strain the meaning of the section to hold that the offender must act as a veritable officer of the government would act. . . .

"It is the false pretense of federal authority that is the mischief to be cured. . . . Obviously, if the statute punished the offense only when an existing office was assumed, its penalties, could be avoided by the easy device of naming a nonexistent office. Therefore, it seems to us, the statute is to be interpreted according to its plain language as prohibiting any false assumption or pretense of office or employment under the authority of the United States . . ."

Here, then, is the holding of the court. It found the meaning of the statute from its plain language. It found that the gist of the crime was the falsely pretending to be an officer of the United States. Granted the pretense, the crime was complete. The donning of the vestments of office without authority was sufficient to trap the unwary. The statute prescribed the pretense, the impersonation, and included, in its plain language, the false pretending to act, either as a real federal officer or a fictitious federal officer.

Every word used in the Barnow opinion was employed in the process of interpreting the true meaning of the language congress had used. The language quoted at pages 18-19 of the government's brief was used *arguendo* as a part of the process of reasoning from which it reached the conclusion that the statute punished pretense with respect to a fictitious office to the same extent as it did to a "veritable" office.

What Appellant seeks to do is to lift that language from context and argue from it that this court was holding that any course of conduct calculated to impair the spirit of respect and good will for government office-holders would come within the condemnation of that statute.

Of course, the language used related only to the holding of the court in the *Barnow* case, and that holding was solely that when congress passed a statute making it unlawful for a person falsely to pretend to be a government officer, congress meant by that statute, that the pretense would be just as culpable whether the pretending laid claim to being a real office holder or a counterfeit office-holder.

Neither the language nor the holding tend to sustain in the slightest degree what Appellant contends for here.

Section 215 is not a false pretense statute at all. It deals with the sale or solicitation to the sale of an actual office. Nothing in the Barnow opinion can

be construed as justifying the thought that the statute was intended to cover offices which had no existence as well as offices which did have existence. The Report of the Judiciary Committee quoted by Appellant at page 12 of the brief begins with these words: "This bill seeks to punish the purchase and sale of public offices". If the statute sought to deal with appointive offices and to cover offices which the defendant pretended to exist, then the reasoning of the *Barnow* case might rescue the present statute from its plain failure to do what Appellant is trying to get this court to stretch it into doing.

The fundamental fallacy of Appellant's entire argument grows out of failure to recognize the restricted area which may be covered by federal crimes, that they are all statutory and that crimes generally—e. g. a supposed fraud sought to be perpetrated by one citizen of Mississippi upon another involving an effort to sell a federal office when there was no federal office to sell—may be punished by the states alone. This court has, at its present setting, drawn attention again to that basic tenet of our dual system, *Rochim v. California*, 1952, 96 L. Ed., Adv. Sh. No. 5, 154, 156:

> "In our federal system the administration of criminal justice is predominantly committed to the care of the states. The power to define crimes belongs to congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U. S. Const. Art. 1, Par. 8 Cl. 18. Broadly speaking, crimes in the United States are

what the laws of the individual states make them ".

Appellant's Other Authorities Inapposite.

But brief mention need be made of the other authorities relied on by the government. What has been said with respect to the *Barnow* case applies to them also. Of course, the *Ferger* case has no application at all *(United States v. Ferger* 250 U. S. 199, 63 L. Ed. 936).

Ferger was charged with fabricating and uttering fictitious bills of lading purporting to represent shipments in interstate commerce. This court pointed out categorically that there was no question that the charges of the indictment were embraced within the plain language of the statute. It was contended merely that congress had no constitutional authority to legislate in such matters. The only thing this court held in that case was that the power of the federal government to protect interstate commerce from fraud was full and complete under the commerce clause.

Pierce v. United States 314 U. S. 306, 86 L. Ed., 226, is Closer to the Point.

This case, decided by the court a quarter of a century after the *Barnow* case, comes much nearer furnishing a pattern for decision of the case now before the court. The court had the same statute before

it as that considered in the *Barnow* case, the False Impersonation Statute (18 U. S. C. 912).

In the *Pierce* case this court reversed a conviction because it was not entirely clear that Pierce came within the plain language of the statute. He had been convicted of pretending to be a government officer "selling T. V. A. units". The Court of Appeals for the Sixth Circuit had concluded that the evidence showed satisfactorily that Pierce was posing as an officer of the United States, this being its language in stating that conclusion, *Pierce v. United States* (Sixth Circuit, 1940) 155 F(2) 399, 401:

> ". . . the conviction was supported by evidence that Appellant held himself out not as an officer or employee of the Tennessee Valley Authority, but as 'acting under the authority of the United States government,' which is a quite different thing and clearly within the condemnation of the statute."

On the basis of that appraisal of the facts and coupled with the failure of Pierce to make due exception to a charge given by the trial court, the Court of Appeals affirmed the conviction. This court reversed. It was not satisfied with the evidence on the point whether Pierce was holding himself out as an agent of the United States government or an agent of T. V. A.

The government stressed the fact that congress had extended the terms of the personation statute so as to make it applicable to all corporations owned

or controlled by the United States. The government insisted strenuously that this showed a congressional intent to extend the protection of the personation statute to the government service generally, arguing that it was the clear intent of congress to protect the public service from false impersonations regardless of whether the pretender came strictly within the language of the statute or not. In other words, the government there made the same strenuous insistence that it makes here, that this court should apply such statutes so as to effect the palpable desire of congress to protect the public service regardless of whether the alleged offense is embraced in the strict language of the statute. But this court refused to follow that argument, holding:

> "These legislative extensions of the scope of the act were in accord with the growing importance of the administrative corporation, but a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. *Lanzetta v. New Jersey*, 306 U. S. 451, 83 L. Ed., 888, and cases cited. While the act should be interpreted 'so as to give full effect to its plain terms' *Lamar v. United States* 241, U. S. 103, 112, 60 L. Ed., 912, 915; *United States v. Barnow*, 239 U. S. 74, 60 L. Ed., 155, we should not depart from its words and context."

The departure from "words and context" advocated by the Appellant here far transcends what the court refused to do there. The statute here deals with support or influence "in obtaining for any person

any appointive office or place under the United States".

An "office or place" is a concept which, though not a paragon of definiteness, has substance and ascertainable meaning. The statute relates, not to office generally, but to appointive office. The statute refers necessarily to an office which is real, not imaginary; actual, not fictitious; existing, not assumed or a speculative possibility; genuine, not fancied.

But that concept does not meet the needs of Appellant. The government was not content to charge the alleged crime in the language of the statute. It did not charge that Brashier used his influence to obtain for Harvey merely "an appointive office and place under the United States". It went further and charged that the appointive office or place was "to be set up and created under the office of Price Stabilization in Amite County, Mississippi," (R. 8).

Of course, no Ration Board had been set up in Amite County, Mississippi, and there was no chairman. The law did not provide for such an office or such an officer. The government found it necessary, therefore, to add to the "words and context" of the statute; and it now asks this court to enlarge the statute as written by adding words and context which the statute did not embrace. Such a course is clearly condemned under the *Pierce* case and many others.

It may be that congress could have written Section 215 so as to embrace not only existing offices but those to be created in the future if and when the exigencies supposed to be in contemplation, should arise. It is possible that congress might have written the statute in these words so as to satisfy what the government now contends for:

> "Any appointive office or place, now in existence, or within reasonable contemplation under existing laws and procedures."

That is exactly what the statute would have to contain if it is to be held to embrace the crimes sought to be charged in these counts of the indictment.

On the other hand, it may be that congress was fearful that the statute was already rather vague and that such an effort at enlargement of scope might run afoul the principles enunciated in the *Lanzetta* case referred to, *supra* in the quotation from the *Pierce* case:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the statute commands or forbids. The applicable rule is stated in *Connally v. General Constr. Co.*, 269 U. S. 385, 391, 70 L. Ed. 322, 328: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair

play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

In that connection, it is pertinent to point out that Section 215 was amended September 13, 1951, by public law No. 141, and that one of the reasons for the amendment was that the term "any appointive office or place" was considered an "ambiguous expression". See U. S. Code Congressional Service, 1951, page 2443. And further that the executive director of the Civil Service Commission and the Deputy Attorney General held conflicting ideas as to the meaning of the section. Ib. pages 2444-2447.

Penal Statutes Strictly Construed.

That the course advocated by Appellant here offends against principles enunciated by this court in numberless cases is plain. It is necessary to mention only two or three. The rule is well stated in *United States v. Resnick* 299 U. S. 207, 209-10, 81 L. Ed. 127, 129:

"Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. . . .Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses."

To like effect is the language of this court in *Prussian v United States* 282 U. S. 675, 75 L. Ed., 610, 612:

> "'But to extend the meaning of that phrase so as to embrace the endorsement on the government draft is to enlarge the statutory definition, and would be possible only by a strained construction of the language . . ., inadmissible in the interpretation of criminal statutes, which must be strictly construed."

During the current term, this court, remarking that the government was asking it "by a feat of construction radically to change the weights and balances in the scales of justice," repeated the admonition in apt words which apply here:

> "The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute."

We refer to the case of *Morissette v. United States*, No. 12, October Term, 1951, decided January 7, 1952, 96 L. Ed., Advance Sheets, 180, wherein the court gave an illuminating discussion of crimes, their nature and categories. To argue here that Brashier could be convicted of selling an appointive office without charging and proving that there was an appointive office which might be sold would me tantamount to arguing in the *Morissette* case that he could be convicted of stealing bomb casings without

showing that such articles were in existence, and that they were the property of the United States. The fact is that the statute under consideration by the court, bears a much closer analogy to that involved in the *Morissette* case (18 U. S. C. 641) then to a false pretense statute such as was involved in the *Barnow* case.

In referring to the shortcomings of the indictment in *United States v. Hess* 124 U. S. 483, 486, 31 L. Ed., 516, 518, this court stated that such an indictment would be "as defective as would be an indictment for larceny without stating the property stolen, or its owner, or the party from whose possession it was taken". Again, in *United States v. Cruikshank* 92 U. S. 542, 558, 23 L. Ed., 588, 593, this court said: "It is a crime to steal goods and chattels, but an indictment would be had that did not specify with some degree of certainty the articles stolen."

The attempt of Appellant to draw a parallel between an effort to sell an existing office which is not momentarily vacant and an office which has no existence falls of its own weight. One can not sell a public office unless there is a public office to sell. The correctness of this assumption is more manifest when one considers the companion statute (18 U. S. C. 214) making it illegal to "offer to procure appointive public office". That statute visits fine or imprisonment upon,

> "Whoever pays or offers or promises any money . . . in consideration of the use or promise to use

any influence to procure any appointive office or place under the United States . . ."

Would Appellant argue that a person could be convicted of offering money for influence in connection with a supposed appointive office that did not exist? The answer to that question and to the question posed under Section 215 is perfectly obvious. It is furnished by such cases as *Pierce v. United States, supra,* and the others here referred to. It is significant that the court, in the *Pierce* case, referred to Mr. Justice Holmes' decision in *United States v. Walter* 263 U. S. 15, 68 L. Ed., 137, in which that eminent jurist adverted to the duty of courts "to limit the generality of words in order to save the constitutionality of an act. . . ."

18 U. S. C. 215 is a Bribery Statute.

This statute appears in Chapter 11, headed "Bribery and Graft". Bribery connotes an offerer, a bribee and an "official function", required to be performed by a "person acting for or on behalf of the United States". Cf. 18 U. S. C. 201. Assuming that Harvey (count thirty-one, R. 8), was the offeror, Brashier the bribee, what was the "official function" which the government had the right to expect of Brashier? Presumably, it was an uninfluenced support for an "appointive office or place under the United States". Was there any such office or place *in esse* at the time? The stipulation of counsel and the judicial knowledge of the court below (R. 14-15),

gave a negative answer. So did the indictment itself (R. 8-9) which sought to supply by averment the necessary ingredient of the statutory bribe.

The terminology of the statute must be vague indeed if the phrase "any appointive office or place" can be stretched to embrace places, which, in the event of total war, might be created if the authorities decided to create them. Appellant calls on this court to exercise a legislative outreach apparently not heretofore conceived of. Cf. *Pierce v. United States*, *Lanzetta v. New Jersey*, *United States v. Strang*, *supra*, and *Krichman v. United States*, 256 U. S. 363, 65 L. Ed., 992.

Even where the other elements of an offense against bribery statutes are present, the "official function" must relate to an activity within the scope of the bribee's duties. *James v. Bowman* 190 U. S. 127, 47 L. Ed., 979; *Blunden v. United States* (Sixth Circuit) 169 F(2) 991; *United States v. Gibson* (Seventh Circuit) 47 Fed. 883; *Commonwealth v. Reese* (Kentucky) 29 Southwestern 352; *State v. Butler* (Missouri) 178 Missouri, 77 Southwestern 560.

Recent Case in Point—United States v. Halseth No. 91, October Term, 1951, Decided January 7, 1952, 96 L. Ed., Advance Sheets, 173.

The burden of the government's argument in this case, boiled down, is this: It is immoral and reprehensible to sell government offices; it is more repre-

hensible to sell a non-existent public office than to sell one which actually exists; congress has demonstrated a zeal for purifying the public service; therefore, this court should take heed of the spirit of congress and adapt the existing statute to meet the needs of any case an enthusiastic prosecutor may seek to make, whether the language of the statute embraces the particular case or not.

This court has answered that argument again and again; again and again it is repeated. This court has answered it again during the present term in a decision whose facts are in close parallel to those in the case under consideration.

Halseth was indicted for sending through the mails a "letter concerning a lottery or scheme offering a price dependent upon a lot or chance . . ." in violation of present 18 U. S. C. 1301, which reads in part as follows:

> "No letter, package, postal card, or circular concerning any lottery . . . or similar scheme offering prizes dependent in whole or in part upon lot or chance . . . shall be deposited in or carried by the mails. . ."

The parties stipulated for the purpose of motion to dismiss "that a letter, a circular, an order blank, and a punch-board were sent to the addressee by mail. The letter subtly indicated how the addressee might obtain a radio free by selling the chances on the punch board and how certain lucky numbers

would reward the purchaser with prizes. . . . The punch board contained an illustration of prizes to be won".

The District Court dismissed the indictment and the government appealed, arguing that Halseth's letter, accompanied by the order blank, the punchboard and full directions contained all of the elements of chance which the statute was designed to cover. If the letter of the statute did not cover Halseth's offense, certainly, it was argued, the spirit and reason and purpose of the statute, covered it fully and completely. This court rejected that argument because the indictment had the same infirmity as the indictment here—it did not refer to an *existing* lottery, but to a lottery which the addressee was invited to set into operation. This court cited as authority its decision in *France v. United States* 164 U. S. 676, 41 L. Ed., 595, from which it quoted the following:

> "The statute does not cover the transaction, and, however reprehensible the acts of the plaintiffs in error may be thought to be, we can not sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly . . . If it be urged that the acts of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

Based upon the reasoning of the *France* case, this court sustained the action of the District Court in dismissing the indictment for the identical reason the court below in the present case dismissed the indictment: Because Helseth's scheme did not constitute a lottery, which was an actuality, but a lottery which would come into being only if the addressee rose to the bait and embraced the proffered scheme. Here is the language of the court in the *Halseth* case:

> "The District Court held that even if these stipulated facts had been alleged in the indictment and accepted as true for the purpose of the motion to dismiss, still the indictment did not state an offense because the mailing did not concern an *existing* lottery or scheme to obtain prizes by lot or chance. The question, therefore, is whether the mailing of gambling paraphernalia that may be used to set up a lottery or similar scheme is a violation of the statute . . .
>
> "In the instant case, too, the statute is penal and must be strictly construed. We hold that the words 'concerning any lottery' mean an existing, going lottery or gambling scheme. The mailing does not purport to concern any existing lottery, and neither the addressee nor the appellee was engaged in the operation of a lottery or similar scheme. The lottery or scheme would come into existence only if the addressee put the paraphernalia into operation . . .
>
> "If punch-boards are to be added to the category of devices to be excluded, it is for congress to make the addition. The judgment is affirmed."

It would be hard to conceive that there would be validity in the government's position here in the light of decisions such as the one quoted from. What the court said there applies perfectly to this case with the changing of a few words. That statute applied only to existing lotteries. This statute applies only to existing offices.

II.

The Three Counts of the Indictment do not Relate to Appointive Federal Offices Dealt with in 18 U. S. C. 215.

Appellant's argument under Heading No. II, its brief, page 20, is entirely without merit. It seeks to advance the thought that since the appointive offices sought to be dealt with in these three indictments were "potential" offices they are embraced in the language of the statute. The quoted word is defined as "existing in possibility, not in fact". That definition comports with the argument. It is clear that, at most, the office sought to be described in the indictments was a possibility only.

At the time of the supposed sales, at the time the indictments were brought and now, rationing was not in existence; the temper of the times tells us that it will not come into existence in the absence of an all-out shooting war. It is pure speculation to assume that there would be a County Ration Board in event rationing should become a reality. Appellant seeks to

create a crime by piling assumption on top of assumption, possibility on possibility, speculation on speculation. Crimes are not created that way, particularly federal crimes. The whole argument answers itself.

Constitutional Questions Not Argued.

Appellees have, at every stage of these proceedings, insisted that their constitutional rights have been denied them (see e. g. their motion to dismiss. R. 10-11). When the case was called for argument in the court below, at the time the order appealed from was entered, they made known their readiness and willingness to proceed with their argument on the constitutional questions presented. (R. 17-18.) They stand ready now to present their arguments challenging the constitutionality of the statute and of the proceedings taken under it, if and when the court should desire such argument. Appellant has not touched on the constitutional questions and the court below did not pass on them in the order appealed from. (R. 14-15.) Appellees do not, therefore, present their arguments on the constitutional questions, but desire that it be clearly understood that they do rely on their constitutional rights as raised by them at the various stages of these proceedings, and that they do not waive such rights.

CONCLUSION.

The argument has spun out too long. Federal crimes are statutory. They are bound to deal with realities, not possibilities. They must be spelled out by statutes plain and understandable in their terms. The three counts of the indictment do not state facts or charge crimes embraced in the statute. The court below was manifestly correct in sustaining the motions to dismiss.

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 426

UNITED STATES OF AMERICA,
Appellant,

versus

CLARENCE E. HOOD, JR., ET AL.,
Appellees.

APPELLEES' PETITION FOR REHEARING.

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SUPREME COURT OF THE UNITED STATES

No. 426

OCTOBER TERM, 1951.

UNITED STATES OF AMERICA,
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versus

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Appellees.

APPELLEES' PETITION FOR REHEARING.

Appellees' respectfully petition the court to grant them a rehearing and state the following grounds:

I.

It would be extremely difficult, if not impossible, to try a defendant indicted under the statute as construed by the court, within the compass of constitutional requirements and conventional procedural practices. This is a result which this court has frequently stated it will avoid. One clear instance illustrating the extent to which the court will go in limiting

"the generality of words in order to save the constitutionality of an act" is furnished in the opinion of Mr. Justice Holmes in *United States v. Walter* 263 U. S. 15, 68 L. Ed., 137. There this court construed the words "any corporation in which the United States of America is a stockholder" as meaning a corporation in which the United States owns all of the stock. Until the filing of the opinion in this case, the court has felt constrained many times to constrict the meaning of the words of a statute; but no instance has been pointed out in which the court has been willing to "stretch" the words of a statute "to cover conduct which is not prohibited on the theory that congress would have done so had it thought about it".

The interdiction of the statute as construed by the opinion extends to "any appointive office or place under the United States, including any such office or place as might reasonably be expected to be established".

How will the government go about proving that the office forming the basis of the complaint might reasonably be expected to be established? How will the trial judge instruct the jury on the point? How will the defendant go about meeting the government's proof? Whose judgment will control as to whether the office was in contemplation and whose process of "expecting" is to furnish the criterion?

How does this court reach the conclusion that the office of Chairman of the County Ration Board in Amite County, Mississippi, was within the scope of the test "might reasonably be expected to be established"? (Cf. R. 8) Presumably its conviction on the subject resulted from the argument presented by the government at pages 23-4 of its brief.

Certainly the congressional act itself says nothing about such an office. Nor does any finding or proclamation of the president contain any such intimation. If the conclusion of the court has any basis, therefore, it arises from the statements of Messrs. DiSalle, Johnston and Wilson. But not one of the quoted statements tends towards the conclusion that County Ration Boards were in contemplation or that any system of rationing of consumer goods was having consideration. The nearest approach to such a point is furnished by the quotation (government brief, page 24) of Mr. Eric A. Johnston who, when asked if rationing would have to be imposed, is supposed to have replied, "That depends. We don't know yet. We may. I am not sure as yet." On the other hand, the government quotes Mr. Charles E. Wilson, the superior of Mr. Johnston, as saying that "Consumer rationing would not be necessary in the near future".

If that testimony were offered at a trial in support of the government's duty to prove the "*corpus delicti*", would it be contended that this was sufficient showing that the office might reasonably be expected

to be established? And how would the litigants produce their proof? Assuming that constitutional requirements would be met by conducting the trial under the beneficent aegis of the Federal Register, would the fact that a government official gave out a statement be of probative value or would the defendant have the right to subject the author of such a statement to cross examination? The practical difficulties of such a course would loom extremely large in consideration of the fact that not one of these three gentlemen is now connected with the government.

Surely it would not be contended that what those three officials said was vested with finality. No one would be in better position to give expert testimony on the subject than the president. Next to the president the secretary of state would probably know more than anyone else about the state of diplomatic relationships out of which war might or might not grow. Nobody has hazarded a prognosis that consumer rationing would be seriously considered in the absence of an all-out shooting war with a major power.

The opinion properly accepts the thesis that judges are not blind to the facts of political life and doubtless the same is true with respect to economic life. Those facts as they would be revealed to one peering into the warehouses of American manufacturers would reveal that they are groaning under an overload of consumer goods so great that rationing would logically be postponed for many months even if all-out war should begin. Would that be competent proof

to be placed before a jury called upon to determine whether a particular office might reasonably be expected to be established? Is a defendant to risk his liberty in the hands of twelve men from the ordinary walks of life on whom has been thrust the burden of viewing world-wide conditions as sought to be interpreted by experts in and out of the government? An affirmative answer to that question will bring about a consummation which is the fundamental dread of the citizens of this republic—a government of men and not of laws. Yet the picture of the problems which would result from the engrafting onto the statute of such a nebulous phrase is, we submit, not overdrawn.

Without doubt, the opinion as filed gives rise to a unique situation. While it speaks of "the peddling of the forbidden wares",—a noun defined by Webster as "manufactured goods of a specific kind . . . goods, commodities, merchandise,"—its essence springs from the fact that it recognizes as bases of criminal statutes, "dealing in futures" and such chimerical concepts as "expectations" of unnamed persons and as accepted by individual juries who may be engaged in trials. In this, it is without precedent in the decisions of this court as far as our research reveals.

In *United States v. Halseth*, 96 L. Ed., Adv. Sh. 173, this court felt that the offense could exist only if the lottery existed and was a thing of present actuality. In *Morissette v. United States*, 96 L. Ed., Adv. Sh. 180, it was considered important, not only that the

shell casings had a physical existence, but that they belonged to the government and that their taking constituted a conscious deprivation of property from the government. In cases under the Dyer Act, it is not possible to prove a crime without proving first that there was an automobile, that it had been stolen and that the transporter knew that it was stolen. A case under the Mann Act is not possible without proving the existence of a female of flesh and blood, organs and dimensions. An employee of the government can not be convicted of embezzling a pig from the government unless it is first proved that the government had a pig—and it is assumed that there must be a pig *in esse*, and not one which had been "authorized" and might reasonably be expected to be born.

The complex situation with which we are now dealing results from the enlargement of the words of the statute. If Brashier had been indicted for soliciting a political contribution in consideration of his promise to Harvey in obtaining the office of Postmaster at Liberty, Amite County, Mississippi, the court would be dealing with a situation for which precedents could be found. Not so here. The introduction of the new ingredient of expectation, unexpressed in the statute, gives birth to a situation with which, we submit, appellees can not deal within the framework of constitutional requirements of due process and of accepted criminal procedures. That result follows from the words the decision adds to the statute and is a result which, under the decision of Mr. Justice Holmes first mentioned above, ought to be avoided; and es-

pecially so if the court is to maintain an attitude consistent with its former holdings.

In *United States v. Cohen*, 255 U. S. 81, 65 L. Ed., 516, the court refus d to enforce a statute making it unlawful to charge "unjust or unreasonable" prices, approving and quoting the language of the lower court in sustaining a demurrer to the indictment:

> "Congress alone has power to define crimes against the United States. This power can not be delegated to the courts or to the juries of this country. . . .
>
> "'. . . the law is vague, indefinite, and uncertain and . . . fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it . . .'"

Mr. Justice Holmes had, a few years before, set the pattern when, speaking for the court, he held the anti-trust laws of Kentucky unenforceable, sustaining the Harvester Company's contention that "the law as construed offers no standard of conduct that it is possible to know."—*International Harvester Company v. Kentucky*, 234 U. S. 216, 58 L. Ed. 1284. And, in *Connally v. General Construction Company* 269 U. S. 385, 70 L. Ed., 322, enforcement was denied an Oklahoma statute requiring a contractor to pay employees "not less than the current rate of per diem wages in the locality", holding that "the constitutional guaranty of due process can not be allowed to rest upon a support so equivocal" as the meaning of words not

"made definite by statutory or judicial definition" rather than "upon the probably varying impressions of juries . . .".

It is clear that the present statute impinges upon the right of a man to speak his mind. If a solicitor of political contributions has been incautious enough to obtain money from one whose eye is fixed on a possible job, he must live henceforth under the real handicap of being unable to express his convictions as to who is best suited to fill that particular office. Those whose eyes are open to reality know that this is inevitably true, regardless of how pure the motives of the solicitor may be.

In such a situation, therefore, he must not speak his mind when men are under consideration for an office. His mouth is closed and his freedom to speak is limited. It is not sufficient to say that he could have avoided that situation by refusing the contribution from the man whose gaze was fixed on a government job. The concurring opinion of Mr. Justice Jackson in *Thomas v. Collins, infra,* 323 U. S., 546-7, 89 L. Ed., 449, aptly points out that "it is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control".

The hazard that the statute offends against the First Amendment of the constitution is increased by the addition by the majority opinion to the words embraced within the statute itself which indubitably brings the statute close to the borderline of repugnance to the Fifth and Sixth Amendments. Can it be doubted that the statute, with the added words, appears as lacking in definiteness as the *State* statute condemned by this court in *Winters v. New York* 333 U. S. 507, 92 L. Ed., 840? That statute challenged the earnest consideration of this court over a period of two years during which the court called for three arguments of counsel.

II.

The opinion filed in the name of the majority on March 31st offends against the universally recognized rule of this court that it will "not depart from . . . the words and context" of the act. Cf. *Pierce v. United States*, 314 U. S. 306, 86 L. Ed., 226. The traditional course of treatment of such matters by congress requires that the words "an office which had been authorized by law and which, at the time of the sale, might reasonably be expected to be established" be not added to the words of the statute itself.

This statute belongs to the category of regulatory measures whose emphasis is "upon achievement of some social betterment rather than the punishment of crimes . . .", a quotation in the *Morissette* case from the decision of Chief Justice Taft in *United*

States v. Balint 258 U. S. 251, 66 L. Ed., 605. It belongs also definitely in the class of those offenses referred to in the *Morissette* case as those "for whose definition the courts have no guidance except the Act." It appears in the chapter on Bribery and Graft, with respect to which whole subject both the congress and the courts have dealt with becoming caution. The companion statutes—see e. g. 18 U. S. C. 201—explicitly limit the crimes therein defined "to any officer or employee or person acting for or on behalf of the United States . . . in any official function . . ."; and the courts have shown a disposition to circumscribe these statutes more closely by requiring that such agents must be acting within the scope of their official duties. *James v. Bowman* 190 U. S. 127, 47 L. Ed., 979; *Blunden v. United States* (Sixth Circuit) 169 F(2) 991.

Essentially the statute operates in the realm of politics and proscribes the wrongful combination of two activities which are not only innocent in themselves but positive goods,—solicitation of money for political parties and use of influence in connection with appointive public office. These relate to "the immunities of the individual" which should not be submitted to "impairment . . . on judicial initiative", *Morissette* case, *supra*.

Influence belongs to the concept of freedom of speech protected by the First Amendment, *Thornhill v. Alabama* 310 U. S. 88, 84 L. Ed., 1093, *Thomas v. Collins, Sheriff* 323 U. S. 516, 89 L. Ed., 430, *West*

Virginia Board of Education v. Barnett 319 U. S. 624, 87 L. Ed., 1628, and any construction of the statute should be avoided which will bring it remotely into conflict with that constitutional guaranty. And whenever it has entered this political field, congress has proceeded with caution, carefully defining and delimiting the restrictions it has sought to place upon free action.

In the statutes governing political contributions by government employees congress carefully phrased the statute, 18 U. S. C. 602, so as to protect one employee from coercive exactions from a superior and this court gave its approval only as to the statutes thus strictly construed, *ex parte Curtis* 106 U. S. 371, 27 L. Ed., 232. Congress denied outsiders the right to solicit funds from government employees only while they were on government premises, the justification being to prevent interference with work and, so limited, this court approved. *United States v. Thayer*, 209 U. S. 39, 52 L. Ed., 673.

Congress did not essay to enter this field of political influence as related to political contributions until 1926 and search reveals only a handful of prosecutions since enactment of this statute. Why should a field so long neglected suddenly assume such importance as would influence this court to attribute to congress so much zeal as to sustain the conclusion that congress had, "in order to strike at the root, made the scope of the statute wider than the immediate evil?"

The picture drawn by the majority opinion of the "unsuspecting influence merchant" does not tend to meet the argument advanced by appellees and lacks force because it is an oversimplification. Under our form of government, strong political parties are essential and they can not have strength without proper financing. Too often political funds are handled by bad men but it is highly desirable that good men be interested in this public service. It is extremely difficult to perform the function of raising money without incurring real liability to prosecution under this statute or some similar statute. This court has confessed to having its eyes open to the machinations of practical politics.

If so, the court knows that a great portion of money raised in any political campaign is contributed by those who desire favors. It is inevitable that those who raise money for political parties have influence with the members of the party who are elected to serve as public officers.

It is hardly conceivable that men would normally be crass enough to go to a prospective donor and say, "I understand that you want to be appointed to public office; if you will donate three hundred dollars to the party, I will recommend you for this office". On the other hand, it would be naive to assume that a donor would fail to let slip some sort of intimation that he would like to be remembered in event of success. The direct approach is not necessary to conviction under the statute, even if restricted in meaning.

Under the circumstances last outlined, no charge would be thought of as long as things ran smoothly. But, as the court knows, the vicissitudes of political life bring first one faction and then another to the ascendency and, at times, the exigencies of the situation are well served by resort to the criminal courts. This statute was born of such an exigency. The meager history furnished in the government's brief, supplemented by facts of public knowledge, reveal that this statute had its origin in the hope on the part of a group of politicians that the one party system in the South could be broken in the coming election, if factions of the party in power in two states could be eliminated by criminal prosecutions.

Since that time the statute and its companion have lain in a state of innocuous desuetude, indicating further that neither the demands of the people nor the attitude of congress, as reflected in the history of this statute and its treatment of the whole field of politics, warrant the application of a rule which would tend to make the scope of the statute wider than "the immediate evil."

Going back to the picture drawn by the court of the mythical character "entrapped by the dubieties of this statute," it can not be forgotten that one of the reasons for the survival and strengthening of liberty in this country has been that this court has been willing to champion the cause even of the most despised criminal, in seeing that he is informed of the nature of the charges against him and that no federal statute

shall be permitted to stand whose terms he, as an average man, can not understand by reading what is printed in the text of the statute.

III.

This decision is, we submit, at war with an unbroken line of decisions preceding it. Throughout its history, this court has adhered undeviatingly to the thesis that congressional acts will not be enlarged by interpretation to encompass a broader field of morals than is required by the words used by congress. That temptation has been placed before the court many times and has been uniformly rejected.

At the base of the expanding process exemplified by the opinion of the majority lies the statement: "It is no less corrupt to sell an office one may never be able to deliver than to sell one he can. . . . We find no basis for allowing a breach of warranty to be a defense to corruption".

Reading this, one is reminded of what Lord Bryce said of the Holy Roman Empire, that "its three distinguishing characteristics were that it was neither holy, nor Roman, nor an empire." There is not a word in this record to justify the thought that any of these appellees made any representation at all concerning the OPS jobs or hinted at a warranty that they could be delivered. The presumptions of innocence conventionally attending persons charged with crime would suggest that the defendants at least

speculated with their supposed victims that the jobs "might reasonably be expected to be established". Nor does the statute concern itself with false pretense. Every state deals with that adequately. The considerations which moved the court to its conclusion, therefore, are without substance either in law or in fact.

The caution with which congress has proceeded in this field demonstrates not only that it recognizes that it can not correct all deviations from the codes of morals and ethics, but that it is a field wherein are planted the very roots of the democratic process. It has never yet passed a statute making it illegal to place a wager on a federal election. Nor has it until now, as far as research reveals, sought to enter the realm of "dealing in futures".

Certainly the *Halseth* case, *supra* is the nearest to this one on the facts. Gambling was the evil aimed at by congress in the statute there under consideration. It could be argued with as much force as here that it was more destructive of morals to use the mails to enter new fields and make new converts and multiply temptations to gambling than it was to invite the public to become participants in games of chance already established. But this court did not feel constrained to depart from its established practice of ascribing to the words of congress only the meaning those words have to the average layman. Therefore, it confined the meaning of the word "lottery" to an "existing" lottery and specifically declined to enlarge the statute

to embrace lotteries which "might reasonably be expected to be established". The court was led to that conclusion, not by any attitude of the Post Office officials, but by its own decision rendered more than a half century ago, *France v. United States*, 164 U. S. 676, 41 L. Ed., 595.

Falsely pretending to be an officer of the Tennessee Valley Authority undoubtedly "discredits the processes of government". But this court was not tempted to repudiate the "fundamental concept of the common law that crimes must be defined with appropriate definiteness" or to depart from the words and context of the statute, even though the statute was one possessing the broad scope of false pretense statutes, *Pierce v. United States* 314 U. S. 306, 86 L. Ed., 226.

Faced with the contention that embezzlement of a national bank's funds by a receiver was fully as corrupt as a like embezzlement by one of its officers, this court refused to hold that such a receiver was an "agent" of such a bank under a statute punishing embezzlement, but, speaking through Mr. Justice Brandeis, stated, "Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive", *United States v. Weitzel*, 246 U. S. 533, 62 L. Ed., 872.

The sole authority cited as support for the conclusion of the majority does not approach the facts of

this case as do those before the same eminent Justice, Oliver Wendell Holmes, in another case cited in the minority opinion:

> "Although it is not likely that a criminal would carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." *McBoyle v. United States* 282 U. S. 25, 75 L. Ed., 816.

The cases are legion along the same line and even a listing of them is not necessary. It is sufficient to say that the opinion filed in this case marks a definite breach with principles heretofore uniformly adhered to by this court, and neither the facts of this case nor the context of the statute nor its history justify such a breach.

We can but suggest that the philosophy of criminal law so lucidly expounded in the *Morissette* case leads inevitably to the conclusion that the majority opinion has the effect of permitting a crime to be constituted from something "less than the incriminating com-

ponents contemplated by the words used in the statute".

Wherefore, appellants respectfully pray that their petition for rehearing may be granted.

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I, the undersigned member of the bar of this Honorable Court and counsel for appellees, hereby certify that this petition for rehearing is presented in good faith and not for delay; and that three copies thereof have been served on appellant by mailing same to the Solicitor General of the United States on April ...., 1952.

....,
Counsel for Appellees.